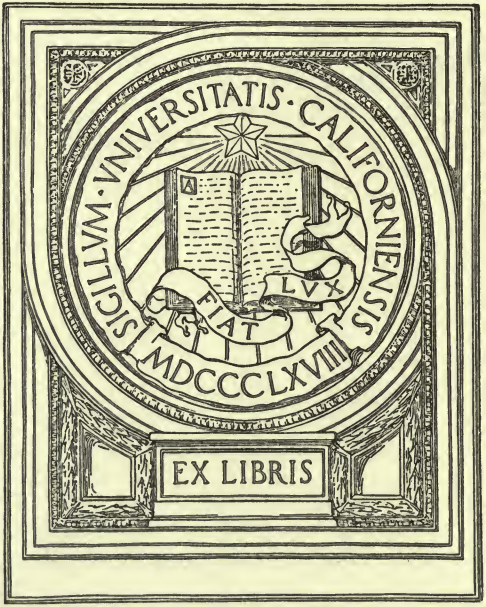
# A HANDBOOK OF PUBLIC INTERNATIONAL LAW

T. J. LAWRENCE

Carleton H. Parker





# PUBLIC INTERNATIONAL LAW

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OF

# PUBLIC INTERNATIONAL LAW

BY

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# PREFACE TO THE SEVENTH EDITION

THOUGH a thorough revision of this book was made in the spring of 1907, the Conventions negotiated at the Hague Conference of the summer and autumn of that year, and the Declaration of London which was the result of the labours of the Naval Conference of 1908-1909, have necessitated a further revision in less than three years. Short as is that period, it has been crowded with great events. Probably it will be regarded in future as the epoch when a statute book of the law of nations took definite form, and the foundations were laid of International Courts to give it authoritative interpretation. All this and more I have set forth very briefly in the text. So numerous are the omissions, alterations, and additions, that the book has been practically rewritten. It is longer by several pages than the previous edition; and at least one-fifth of it is new matter.

T. J. LAWRENCE.

UPTON LOVEL RECTORY, WILTS,
*October* 1, 1909.

# PREFACE TO THE SIXTH EDITION

A FEW weeks after this little book was first issued, its adoption by the British Admiralty for the officers of the Royal Navy caused the appearance of a second edition. Others followed in due course; and now a translation for the use of the Italian Navy affords the opportunity of careful revision, and necessitates a sixth edition.

In the original preface I stated that, though the book was in no sense an analysis of any larger work, it was an attempt to analyse International Law, and hoped to be found useful as an introduction to the more comprehensive treatises which enrich our legal literature. It was designed chiefly, though not exclusively, for the benefit of students unable to obtain oral information, and men of action with little taste for legal subtleties and little time for minute investigation. To aid both classes I added at the end of each chapter references to the leading English text-books; and to enable the former to test their own knowledge I published, along with the references, a few examination questions. These features still remain, though they

have been altered to meet modern needs and keep pace with the growth of our legal literature. My endeavour throughout has been to put accepted principles and settled rules into plain words. Where matters are doubtful I have frankly said so, adding, as far as space would allow, a statement of divergences of doctrine and the reasons for them.

The book has been revised from cover to cover. In spite of strong efforts at compression a few additional pages appear. Special pains have been taken to bring the information on all subjects down to the date of publication. In dealing with the modes of acquiring title to territory, I have dwelt at some length on the modern developments of the doctrine of Occupation. Matters arising out of International Leases, Protectorates, and Spheres of Influence have received enough attention to enable my readers to understand some recent controversies and agreements, and to form for themselves an intelligent anticipation of future transactions. In the latter half of the book I have glanced at the points raised during the wars of the last few years, especially the questions of the rights and duties of neutral States which became prominent in the great struggle between Russia and Japan. The proceedings of the Hague Conference of 1899 have received the notice which their importance demands. Many intelligent people

seem to be of opinion that the Conference was a failure because the States represented therein could not agree upon a limitation of armaments. Those whose studies lie among the Laws of War know how mistaken a view this is. Its falsity is shown even by the few and small pages of my little manual.

The reception of the book was from the beginning better than its deserts. I hope it is now less unworthy of the kind things said about it in the press, and by naval and military officers. My long experience as lecturer on International Law, first at the Royal Naval College, Greenwich, and afterwards at the Royal Naval War College, Portsmouth, has at least given me an insight into the needs of the services. Some of the most profitable hours of my life have been spent in association with capable and devoted officers who have now come to the front, and hold positions of honour and responsibility in navy and army. I cannot thank them too much for all they have taught me. If in return I have been able in lecture or book to place before them clearly and accurately some of the rules it is their duty to apply in peace and war, I have but repaid a small portion of a great debt. Sometimes I am told of experiences which seem to show my efforts have not altogether failed. A story of some years ago

will illustrate my meaning. There was a war far away, and we were neutral. A belligerent cruiser was engaged in some interference with our trade which the captain of a British man-of-war on the spot deemed to go beyond her rights. A young officer was hastily put into a boat, and ordered to pull with all speed, and inform the belligerent that she must desist. As he took his seat he shouted that he knew nothing about the matter. Thereupon a copy of this book was thrown into his boat as it left the side of the British vessel. And his studies were so effective that, by the time he reached the belligerent, he was able to convince her commander by cogent arguments and unanswerable authorities that there was no legal warrant for his action, which ceased forthwith!

T. J. LAWRENCE.

Upton Lovel Rectory, Wilts,
*March* 26, 1907.

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# PART I

## INTRODUCTORY

# CHAPTER I

## THE DEFINITION AND NATURE OF INTERNATIONAL LAW

### A. The Definition of International Law.

International Law may be defined as *The rules which determine the conduct of the general body of civilised States in their dealings with each other.* There is still much dispute as to the nature of International Law, its methods, its limits, and its relation to the science of Ethics. All attempts to define it are coloured by the views held with regard to these matters by the individual who frames the definition. That which we have just given proceeds upon the theory that it is the chief business of students of International Law to find out the rules actually observed by States in their mutual intercourse, and to classify and arrange them by referring them to the fundamental principles on which they are based. We must note with regard to it that it refers to

(1) Rules which *are* generally observed, not to

rules which in the opinion of those who propound them *ought to be* generally observed.

Whether a rule is morally right or morally wrong, it forms part of International Law if it is generally accepted and acted upon.

(2) Rules which are generally observed by *civilised* States, not rules which are generally observed by *Christian* States only.

Modern International Law grew up among a group of Christian States, and was largely influenced by Christian views of conduct; but inasmuch as it is now accepted by a few non-Christian States, such as Turkey and Japan, we cannot speak of it as a system peculiar to Christian nations. It is, however, peculiar to civilised peoples; but the exact amount of civilisation necessary cannot be reduced to definition. Though utterly barbarous tribes could not come under it, the conduct of civilised States towards them should be regulated by the principles of justice and mercy.

(3) Rules which are generally observed by civilised States in some of their dealings with *individuals belonging to other States*, as well as rules which are generally observed by civilised States in their dealings with *other States*.

Each State in its dealings with foreigners is governed partly by rules which it is free to settle for itself at its own discretion, and partly by rules which are determined by the

general agreement of civilised powers. The former do not belong to International Law, the latter are part of it, as being in reality rules which obtain between States, though the objects to which they apply are individuals. In many cases of maritime capture, for instance, States deal directly with private individuals belonging to foreign nations according to rules which have received the express or tacit consent of all civilised powers.

The name International Law is comparatively modern. Till the nineteenth century the science was called the Law of Nations, or the Law of Nature and Nations. But the new designation is better, though it is not absolutely exact. It avoids the danger of confusing our subject with the Roman *Jus Gentium*; but it obscures the fact that, in so far as States are distinct from nations, the former, not the latter, are subjects of International Law.

## B. **The Nature of International Law.**

In discussing the nature of International Law we have to consider

(1) Whether we can deduce it from a so-called Natural Law, that is to say, from certain principles of universal authority, discoverable by human reason, but existing independently of any arrangements made by men, or whether it is generalised from the practices of States in their mutual dealings.

The founders of modern International Law were disciples of the first theory, owing to their belief in a Law of Nature applicable to States; but they did not distinguish it clearly from the second, and their mixed methods of thought have often been followed by succeeding writers. It can, however, be shown that

(*a*) The theory of a Law of Nature is false historically, and untenable philosophically because it confounds together the actual and the ideal.

(*b*) Those who believe in it differ greatly as to the character and commands of the so-called Law of Nature.

(*c*) States generally appeal in their controversies, not to innate principles and absolute rights, but to rules which can be proved to have been acted upon previously in similar circumstances by all or most civilised nations.

We therefore hold that the rules of International Law are to be discovered by observing the conduct of States in their mutual dealings, and that its method is mainly historical and inductive. But ethical considerations are not therefore excluded; for when there are two or more currents of practice and opinion, the law must be doubtful until one of them prevails. In such cases the opinions of jurists should be given in favour of those rules which seem most just and

humane, and best accord with accepted doctrines. Moreover, new cases often arise unlike any that have been decided before. New rules are then wanted, and in their creation moral principles should be allowed a preponderating influence. International Law advances by means of the growth of opinion; and to its students belongs the responsibility of influencing the minds of men in favour of righteousness in all transactions between States, though they must never be led by moral enthusiasm into declaring a good rule to be part and parcel of their system before it has met with general acceptance.

(2) Whether International Law is, properly speaking, law at all.

Most of its rules lack a sanction. That is to say, no definite and fore-ordained punishment is inflicted by superior authority in case of disobedience, though it often happens that an offending State is made to suffer in some way by another State or States in consequence of its offence. Therefore the claim of the rules of International Law to be considered laws in the fullest sense is often denied by English thinkers. It should, however, be noted that

(*a*) Many of the rules of maritime capture have very definite sanctions, supplied through the machinery of Prize Courts, and are therefore laws of the strictest kind.

(*b*) The generally received English definition

of Law is not the only one possible. If we follow it in the stress it lays upon superior force, regarding laws as commands which man is compelled to obey by fear of a definite evil to follow upon disobedience, we must hold that most of the rules of International Law are not laws in the strict sense of the word. If, on the other hand, we lay stress rather upon the notion of order, regarding laws as commands which do actually regulate conduct, then we may use the term International Law with perfect propriety.

We may sum up our conclusions with regard to the nature of International Law by saying that it must be looked upon as, in the main, a collection of positive rules actually observed among civilised States, but that whether we call it Law or not is a matter of nomenclature of no very great importance, as long as we have just ideas of its character, its methods, and its immense value as an instrument of human progress.

### Questions

1. Define International Law, and discuss the propriety of the name.
2. To what kind of States is International Law applicable?
3. What is the proper method to be followed in the study of International Law?
4. Examine the theory of a Law of Nature.

## Hints as to Reading

The questions discussed in this chapter are considered by Westlake in the First Chapter of Pt. I. of his *International Law,* and more at length in his *Chapters on the Principles of International Law,* Ch. I. Oppenheim deals with the same subjects in the Introduction of his *International Law,* Vol. I., Ch. I. Boyd's edition of Wheaton's *International Law,* Pt. I., Ch. I., should be read by those who wish to trace the various versions of the theory of a Law of Nature given by the great writers whose opinions are set forth therein. Most books on International Law commence with some account of its nature, and some attempt to define it. Such an account and attempt are to be found in the first Chapter of Part I. of Lawrence's *Principles of International Law* (4th ed.).

## CHAPTER II

### THE HISTORY OF INTERNATIONAL LAW

### A. Periods.

THERE are few tribes so barbarous as not to have some customary rules for their guidance in dealing with their neighbours; but International Law, as we understand it, is a system which has grown up among the nations of Europe, and has extended itself to all civilised communities outside the European boundaries. In its modern form it is scarcely three hundred years old; but rudimentary germs of it are to be found in remote antiquity. We may divide the history of International Law into three periods, each of which witnessed the application of a definite principle to the mutual relations of States.

(1) From the earliest times to the establishment of the Roman Empire.
(2) From the establishment of the Roman Empire to the Reformation.
(3) From the Reformation to the present time.

Each of these periods gradually merges into its

successor, and each is marked by the supremacy of a fundamental principle, which is for ages accepted without doubt or hesitation, is then questioned as it becomes less applicable to altered circumstances, and is finally superseded by a new principle adapted to the changed state of international affairs.

## B. **Principles.**

We will now state the principles referred to above, and show how each forms the basis of International Law in the period to which it applies.

(1) The principle of the first period was *That States as such had no mutual rights and obligations, but that tribes which were connected by blood-relationship owed each other certain duties.*

Kinship was the basis of ancient society; and as it settled the condition of the individual within the State, so it prescribed and limited the duties of the State to other States. Outside the circle of real or supposed blood-relationship there were few bonds between men. Thus we find in the history of ancient Greece that

(*a*) Barbarians were regarded as intended by Nature to be slaves, and no relations but those of hostility or supremacy were accounted possible with them.

(*b*) Among peoples of Hellenic descent there was a rudimentary International

Law, which laid down that those who died in battle were to be buried, that those who resorted to the public games were not to be molested, and a few other rules of a similar kind.

(*c*) A code of maritime law grew up among the seafaring Greek peoples, and was afterwards embodied to some considerable extent in the legislation of the Roman Emperors.

With regard to Rome no satisfactory evidence has been produced that the Republic regarded foreign nations as possessed of any rights against it, other than those arising from special compact, except perhaps as regards the keeping of faith and the sanctity of the persons of ambassadors. The enforcement of discipline in its armies, and the ceremonial for declaring war prescribed by the *Jus Feciale*, sprang from the Roman love of order, rather than from any idea of international duty.

(2) The principle of the second period was *That there was somewhere a common superior whose decisions were binding upon States.*

When the Roman Emperors ruled the greater portion of the then civilised world, the notion of universal sovereignty arose and became one of the most deeply rooted ideas of mankind. We have to note with regard to it that

(*a*) Till the Roman Empire sank into decay, idea and fact corresponded. The disputes of subordinate princes and commonwealths were settled by appeals to Cæsar. What he commanded was law in international as well as in municipal affairs.

(*b*) The revived or Holy Roman Empire of Charlemagne and his successors claimed universal supremacy, and men held the claim to be reasonable. As the Papacy grew stronger, and the Empire became more and more Germanic, the Popes set up a rival claim to world-wide dominion, and succeeded at any rate in destroying much of the prestige of the Empire. But the rise and growth of the notion of territorial sovereignty, the gradual curtailment of the Empire, and the corruptions of the mediæval Papacy, tended to weaken the theory that States must of necessity have a common superior.

Belief in the principle of universal supremacy was shattered by the Reformation. The Pope and the Emperor were compelled to take sides in a great international conflict, which, according to the hitherto dominant theory, ought to have been settled by the authority of one or the other, or both of them. At the same time the discovery of America raised a host of new problems which existing rules

were unable to solve. There was great danger of international anarchy, but fortunately a new system arose in time on the ruins of the old.

(3) The principle of the third period is *That States as such have mutual rights and obligations, which do not rest for their authority upon the commands of any common superior.*

The destruction of the old international order, and the need of some solution of the questions which arose from the discovery of the New World, set many able men on the endeavour to find some generally acceptable foundation for a new order. By far the most successful of these was Hugo Grotius, who published his *De Jure Belli ac Pacis* in 1625. He may be regarded as the founder of modern International Law. His reasoning was based upon the proposition that though States have no common superior, nevertheless they are bound to one another by mutual duties, which are determined by a Law of Nature and by general consent. In elaborating his system he borrowed largely from the Roman *Jus Gentium*, a system connected, like his own, with Nature and Nature's Law. Statesmen and jurists adopted his principles; and they became the foundation of the public law of modern Europe. We must note that

(*a*) The theory of a Law of Nature is now falling into discredit, and the express or

tacit consent of States to be bound by the rules of International Law is generally regarded as the sole and sufficient foundation for their authority. Unless the intention to make the Hague Conferences periodical fails of performance, a machinery has already been provided whereby once in every seven years the consent of States can be formally signified to such additions and improvements as may seem good to them after careful deliberation.

(*b*) The age of Grotius believed implicitly in Natural Law, and would probably have declined to accept his humanising precepts, had they not been regarded as portions of a code which was held to possess a binding force independent of human institution.

Since the time of Grotius International Law has advanced along the lines laid down by him. Some of his rules were never adopted; others were acted upon for a time, but afterwards dropped in the course of progress; many were in a rudimentary condition, and have since developed with the growth of civilisation; while large bodies of new rules have been elaborated to meet new wants and deal with changed circumstances. But in its broad outlines the Grotian system still remains; and though, as we shall see when we come to Pt. II., Ch. IV., one of its fundamental principles shows signs of

giving way, in other respects it seems likely to command the assent of civilised mankind for a long time to come.

### Questions

1. Into what periods would you divide the History of International Law? Give the reasons which cause you to make the divisions you adopt.
2. Show that the principle of kinship was the foundation of international relations in ancient society.
3. Account for the break-up of the European State System and international order at the time of the Reformation.
4. What were the fundamental propositions of the *De Jure Belli ac Pacis* of Grotius? Show how they became the foundation principles of modern International Law.

### Hints as to Reading

In Westlake's *Chapters on the Principles of International Law*, Chs. II.-V., will be found a learned account of the history and development of our subject. Oppenheim gives a similar account in his *International Law*, Vol. I., Introduction, Ch. II. In Maine's *Ancient Law*, Ch. V., the connection between International Law, Roman Law, and the so-called Law of Nature is well brought out, though more recent research seems to call for the modification of some of the views therein

expressed, as is recognised by Maine himself in Lecture II. of his *International Law*. Chs. VII. and XV. of Bryce's *Holy Roman Empire* show the character of the power exercised by the Pope and the Emperor on the international affairs of mediæval Europe. Lawrence deals with the history of International Law in Pt. I., Ch. II., of his *Principles of International Law* (4th ed.). Wheaton's *History of the Law of Nations*, and Walker's *History of the Law of Nations*, are valuable as books of reference.

## CHAPTER III

### THE SUBJECTS OF INTERNATIONAL LAW

### A. Subjects.

ALL the subjects of International Law do not stand on the same footing with regard to it. Its rules govern their mutual relations in a greater or less degree, according to the circumstances set forth in the rest of this chapter. They may be classified as follows:

(1) Sovereign States.

A State may be defined as *A political community, the members of which are bound together by the tie of common subjection to some central authority, whose commands the bulk of them habitually obey.* It is *sovereign* or *independent,* if its government does not render habitual obedience to any earthly superior. It is *a subject of International Law* if it is one of the States among whom the accepted system of international rules grew up, or if it has been received into the family of nations, that is to say, into the number of those political communities which possess the rights and are

subject to the obligations conferred by International Law on Sovereign States. Internal sovereignty is the power exercised by rulers over their own subjects. External sovereignty is the power of dealing on behalf of a State with the government of other States. The Sovereign States that are subjects of International Law must be divided by two classes:

(*a*) The Great Powers of the World. These are the Great Powers of Europe—Great Britain, France, Germany, Austria-Hungary, Italy, and Russia—and in addition the United States of America and Japan. The authority which belongs to their position will be considered in Pt. II., Chs. I. and IV.

(*b*) Ordinary Independent States. They possess the ordinary rights given by International Law to Sovereign States, but do not share the authority claimed by the Great Powers in supervising and altering some of the existing international arrangements.

All independent political communities in which the supreme authority speaks for the whole State in its dealings with other States, are alike in the eye of International Law, whatever may be the peculiarities of their internal constitutions. The question whether a State is internally an organic whole, or a number of political bodies more or less

separate, is important from the point of view of Constitutional Law, but does not come within the province of International Law, unless a portion of the powers of external sovereignty is reserved by the constitution to each separate political body within the composite whole.

(2) Part-sovereign States.

A Part-sovereign State, in the sense given to the term in International Law, is *A political community in which part of the powers of external sovereignty are exercised by the home government, and part are vested in or controlled by some other political body or bodies.* Such communities come under International Law only with regard to that portion of their external affairs in which they can act for themselves. They may be divided into two classes:

(*a*) Client States. By this phrase we signify those States who are obliged to share in any degree, large or small, the control of their external relations with some foreign power or powers. Such States require an appropriate name to mark them off from fully sovereign States on the one hand, and on the other from another kind of part-sovereign State which we will describe immediately. The terms Protectorate and Suzerainty are used too loosely to be of any use for

purposes of scientific classification; and sometimes for diplomatic reasons neither is applied where there is undoubtedly a great derogation of full sovereignty. Thus, for instance, Cuba, which is called an independent State, has accorded to the United States a right of intervention in certain eventualities, and a right to acquire naval stations in Cuban territory, and has also submitted to certain restrictions on her dealings with other powers. Clearly her government is seriously limited in the exercise of external sovereignty, and the powers which it lacks are vested in the authorities at Washington. She is, therefore, a Client State, like Crete, which is described as autonomous and under the suzerainty of the Porte, but which governs itself in its own way, except that it must not join the Greek kingdom and must display the Turkish flag at one spot in the island.

(*b*) Members of a Confederation in which each State retains some of the powers of external sovereignty, while the remainder are exercised by the central authority of the Confederacy. There is no good example of this loose kind of Federal Union in existence now; but the German Confederation as it was from 1815 to 1866 affords an example.

The term Part-sovereign is not applied in diplomatic documents to permanently neutralised States such as Belgium and Switzerland; and though their independence is guaranteed on condition of abstention on their part from offensive warfare and any engagements which might lead to it, the limitation of their external sovereignty caused thereby is so slight that it need not be noticed.

(3) Belligerent Communities not being States.

These are communities which are endeavouring to assert their Independence by war, but are not yet recognised as Sovereign States. They often obtain what is called Recognition of Belligerency, the effect of which is to endow them with the rights, and impose upon them the obligations, of independent States, so far as the conduct of hostilities is concerned, but no further. Their ships of war are accounted lawful cruisers, and their soldiers lawful combatants, but their governments cannot negotiate formal treaties or accredit diplomatic ministers. In Pt. III., Ch. I., will be found an account of Recognition of Belligerency.

(4) Privileged Corporations.

A number of great trading companies have been allowed by the States under whose laws they were incorporated, to acquire territory in distant lands, to exercise dominion therein, and to make peace and war with native chiefs. Such bodies are subjects of International Law

in an extraordinary and abnormal manner. As regards the natives of the districts assigned to them, they exercise many of the powers of sovereignty. As regards their own governments, they are subjects. In recent years the great colonising powers have granted charters to many such companies. For example, Germany in 1885 gave special concessions and jurisdiction within vast districts of her sphere of influence in East Africa to the German East African Company; and for a period which ended in 1905 Italy allowed the Benadir Company to exercise administrative functions over a portion of Italian Somaliland. Great Britain has acted in a similar manner with regard to various British companies, among the chief being the North Borneo Company and the South Africa Company. Some idea of the magnitude and importance of the operations of these bodies may be gathered from the fact that the Niger Company, which received its charter in 1886 and surrendered its territories to the Crown in 1900, had more than three hundred treaties with native tribes. The territories within which power is thus exercised tend to come gradually under the direct rule of the State which grants the charter.

Though private individuals and ordinary corporations may be dealt with under International Law, as owners for instance of property captured in war, it is best to regard them rather as objects of Inter-

national Law than as its subjects. There is, however, one individual whose position is unique. The Pope has ceased to be a temporal sovereign; but nevertheless he accredits legates and nuncios to those powers who are willing to receive them and send diplomatic agents to him in return. The Italian Law of Guarantees provides that he shall receive in Italy the honours bestowed on sovereigns; but at the same time his own guards are not regarded as his subjects, and his palaces are held to belong, not to him, but to the Italian State.

## B. **The Admission of New Subjects.**

The admission of new subjects within the pale of International Law takes place in three ways:

(1) When a State whose institutions have hitherto been accounted incompatible with Western civilisation is received into the family of nations by a formal act on the part of those States, or the most important of them, who are already members of it. Such was the case when in 1856 Turkey was by the Treaty of Paris admitted to participate in the advantages of the Public Law of Europe. It occurred again in a different form when in 1899 the leading powers, headed by Great Britain, abolished consular jurisdiction in Japan, and agreed that their subjects in Japanese territory should live henceforth under Japanese law and be tried by

Japanese courts. No State is likely to gain admission unless it possesses

(*a*) A certain amount of civilisation. On this point it is impossible to lay down any definite rule. Each case must be judged on its own merits by the powers who have to deal with it.

(*b*) A fixed territory. International Law assumes that sovereignty is territorial. Nomadic tribes would therefore be unable to comply with the demands it makes upon its subjects.

(*c*) A certain size and importance. A small and unimportant community, lying apart from any of the main currents of human affairs, would be too insignificant to be noticed.

The Great Powers, or some of them, generally take the lead in admitting States such as we have described into the family of nations.

(2) When a new body politic formed by civilised men in districts hitherto left free from civilised control is recognised as an Independent State.

This was the case with the Republic of Liberia, originally founded by American philanthropists as a settlement for emancipated negroes on the coast of Upper Guinea. Great Britain recognised its independence in 1848, and other States have since followed her

example. In 1884 and 1885 the chief powers of Europe and the United States of America accorded a similar recognition to the Congo Free State, established by the International Association of the Congo in 1879, and ceded to Belgium in 1907.

(3) When a civilised political community, which has cut itself adrift from the body politic to which it formerly belonged and started a separate existence of its own, receives Recognition of Independence from other States. The separation may take place by peaceful means, as in the case of Norway and Sweden in 1905, but it is generally the result of an armed struggle.

Recognition is express or implied. The former is given by special treaty stipulations, the latter when conventions are negotiated, diplomatic representatives accredited, or other acts done such as independent States alone can be parties to. As a rule, Recognition is absolute, but there are a few cases where it has been conditional. For instance, by the Treaty of Berlin of 1878 the Great Powers recognised the independence of Montenegro, Servia, and Roumania, on condition that complete religious liberty was granted within their territories.

By recognising a new community no just ground of offence is given to any State from which it may have revolted, if it

(*a*) Has an organised Government, carried on in civilised fashion, and capable of

dealing with other States in the manner prescribed by International Law.

(*b*) Possesses a fixed territory.

(*c*) Has actually or virtually brought to an end in its own favour the contest between itself and the parent State.

Recognition of a revolted province or colony while a serious conflict is still going on is an act of unfriendly Intervention, which the parent State may, if it chooses, make into a cause of war. A colony or province, which obtains and keeps a *de facto* Independence, is sure to receive Recognition from all powers sooner or later, the quickness or tardiness of each being often determined by its political sympathies. Recognition by one State, or a body of States, in no way binds others; but when the Great Powers agree to recognise a community, the smaller States almost invariably follow their lead.

## Questions

1. Define a State. What States are subjects of International Law?

2. Distinguish between the various kinds of Part-sovereign States, and show how far their subjection to International Law extends. Give an example of each kind.

3. Discuss whether corporations and individuals may be regarded as subjects of International Law.

4. What is Recognition of Independence? In what circumstances may it be given without offence?

## Hints as to Reading

Pt. I., Ch. I., and Pt. II., Ch. I., of Hall's *International Law* should be read. Chs. III. and IV. of Pt. I. of Westlake's *International Law*, Ch. I., Pt. I., Vol. I. of Oppenheim's *International Law*, and Ch. III. of Pt. I. of Lawrence's *Principles of International Law* (4th ed.), contain recent and valuable information. A fuller discussion of principles will be found in Westlake's *Chapters on the Principles of International Law*, Chs. VI., VII., and X. But every one who wishes to have a real living knowledge of International Law must observe the changes that are continually going on around him, and follow carefully the international controversies of his time.

## CHAPTER IV

### THE SOURCES AND DIVISIONS OF INTERNATIONAL LAW

Die Quellen des Völkerrechts

### A. Sources.

If we mean by a source of law that which gives it authority and binding force, then there is but one source of the law of nations, and that is the consent of nations. No rule can have authority as International Law unless it has received the express or tacit acceptance of the great majority of civilised States. But before the process of acceptance there must be a process of formation. And if we prefer to signify by source, as applied to a rule of law, the place where it is first found, we can discover five sources of International Law. They are:

(1) The works of great publicists.

There are a number of writers on International Law, beginning with Suarez and Ayala, Gentilis and Grotius, and ending with the leading publicists of our own day, whose works have influenced, and do still influence, the practice of States, and whose published opinions are appealed to in international controversies. Their views are valuable in

proportion to their knowledge, ability, and impartiality. They apply admitted principles to doubtful points, and thus often evolve rules which are afterwards embodied in the practice of States. On the other hand, their opinions may be overriden by contrary usage.

(2) Treaties.

With regard to these considered as sources of international rules, there was a wide difference of opinion. A school of Continental writers argued as if treaties, or rather a certain number of them arbitrarily selected, formed a *corpus* of International Law. On the other hand, most British and American publicists were disposed to lay little stress on them. But the course of events is pointing so strongly in the direction indicated below that serious divergencies will soon be no longer possible. Treaties may be classified as follows:

(*a*) Law-Making Treaties. These are treaties assented to by all or nearly all civilised States, and avowedly altering or adding to the law. The most conspicuous examples of these are the Conventions drawn up at the Hague Conferences of 1899 and 1907, and the Declaration of London of 1909. We may also mention the Declaration of Paris of 1856, the Geneva Convention of 1864, revised in 1906, and the Final Acts of the West African Conference of 1885,

and the Brussels Conference of 1890 for the Suppression of the African Slave Trade. The list is by no means complete, and it includes international instruments which are awaiting ratification. Not till they have received it will they become formally binding; but there is no reasonable doubt that it will be given in due time. We may speak of these Law-Making Treaties as forming a statute-book of the laws of nations. Most of them are very recent, and none go back beyond modern times. The existence of such a *corpus juris* is a new and most significant development in the evolution of an organised society of nations, with accepted rules for the guidance of its members and appropriate organs for the performance of functions essential to its welfare.

(*b*) Treaties declaratory of the law. These are rare; but they may be sources of law if their interpretation of it is generally accepted.

(*c*) Treaties signed by two or three States only, and stipulating for a new rule or rules as between the contracting parties. At the time these are made they are evidence of what International Law is not rather than of what it is; but, if the new rule works well, and is gradually adopted by all other States, the treaties

in which it originally appeared become sources of International Law. This was the case with the treaty of 1650 between Spain and the Netherlands, which introduced among Christian States the rule that the goods of an enemy were not subject to capture on board a neutral vessel unless they were contraband of war.

(*d*) Treaties containing no rules of international conduct, but simply settling the matter in dispute between the parties to them. Most treaties belong to this class; and it is obvious that they do not affect International Law in any way.

Important treaties generally contain stipulations on a great variety of subjects. When, therefore, we speak of treaties of such and such a character, we must be understood to mean portions of treaties as well as entire documents.

(3) The decisions of Prize Courts, International Commissions, and Arbitral Tribunals.

Prize Courts are described in Pt. III., Ch. V. The decisions of the Judges of the more important of them are often most valuable sources of law; for they are the productions of trained intellects applying recognised principles to new sets of circumstances. At the moment they merely decide the case on hand; but the reasonableness of

the rules laid down often leads to their general acceptance, and thus in time they are incorporated into International Law. For instance, the Doctrine of Continuous Voyages, which is now a part of the law of capture at sea, was first elaborated and applied by Lord Stowell, a great English Prize Court Judge, during the war between Great Britain and France at the end of the eighteenth century. It has since received certain extensions and limitations, and was accepted in its final form by the Naval Conference which drew up the Declaration of London of 1909. When the International Prize Court of Appeal projected at the Hague in 1907 is established, its decisions will command greater weight than those of any national Prize Court however eminent. In the same way International Tribunals, such as Commissions and Boards of Arbitration, will help the International Prize Court in making the authoritative international case law of the future.

(4) State Papers, other than Treaties.

The government of every important State constantly sends despatches and memorials to foreign powers, and these may become Sources of International Law when they deal with knotty points in so masterly a manner that their conclusions are generally adopted. Thus the British Memorial of 1753 in the Silesian Loan Controversy placed beyond possibility of

doubt the doctrine that a State cannot make reprisals upon money lent to it by private persons belonging to another country.

(5) Orders and Instructions issued by governments to their own servants.

These are sometimes concerned with matters of international import, and in such cases it is possible that some of the rules they lay down may in time be adopted by other States. The French Marine Ordinance of 1681 helped greatly in the development of Prize Law; and the Instructions for the Guidance of the Armies of the United States in the Field issued in 1863 led gradually up to the Code for the regulation of Land Warfare adopted by the Hague Conference of 1899.

It must be clearly understood that the consent of States alone can give authority to a rule, and that, unless all or nearly all civilised powers have signed a document which lays down the rule, the best evidence of their consent is practice. Thus practice is, as it were, the filter-bed through which much that flows from the sources we have mentioned must pass, before it can enter the main stream of International Law.

### B. **Divisions.**

The divisions of International Law given by many text-writers are either unscientific or useless. We shall find it best to divide International Law into heads according to the different kinds of rights

possessed under it by States, and their corresponding obligations. Thus we get

| | |
|---|---|
| Normal Rights and Obligations of States. | (1) Rights and Obligations connected with Independence.<br>(2) Rights and Obligations connected with Property.<br>(3) Rights and Obligations connected with Jurisdiction.<br>(4) Rights and Obligations connected with Equality.<br>(5) Rights and Obligations connected with Diplomacy. |
| Abnormal Rights and Obligations of States. | (1) Rights and Obligations connected with Belligerency.<br>(2) Rights and Obligations connected with Neutrality. |

By the Normal Rights and Obligations of States we mean those which they possess simply as subjects of International Law. By the Abnormal Rights and Obligations of States we mean those which they possess when they have superadded other capacities to their capacity as subjects of International Law. The Normal Rights belong to them in the ordinary circumstances of peaceful international life. They obtain the Abnormal, as an addition to or qualification of the first, in the extraordinary circumstances of belligerency or neutrality. We thus get a division of International Law into The Law of Peace, The Law of Belligerency, and the Law of

Neutrality, each of which will be the subject of one of the three following parts.

## Questions

1. What is meant by a Source of International Law? In what sense is it correct to speak of the great publicists as possessed of authority in disputes between States?

2. Estimate the importance to be attached to treaties as sources of International Law.

3. Why are the decisions of Prize Courts constantly quoted in books on Maritime Law?

4. Give the Divisions of International Law which commend themselves to you, and state the reasons for your preference.

## Hints as to Reading

Hall does not deal directly with the Sources of International Law, but some valuable remarks on Treaties considered as such will be found in his Introductory Chapter. Westlake's views are to be found in Ch. II. of Pt. I. of his *International Law*, Oppenheim's in Ch. I. of the Introduction to Vol. I. of his *International Law*, and Lawrence's in Pt. I., Ch. IV. (4th ed.) of his *Principles of International Law*. Ch. VI. of Vol. I. of Twiss discusses at length "The Sources of the Law of Nations," and Ch. II. of Halleck deals with the same subject in a somewhat different manner, as does Pt. I., Chs. III.-VIII. of Phillimore.

# PART II

# THE LAW OF PEACE

# CHAPTER I

## RIGHTS AND OBLIGATIONS CONNECTED WITH INDEPENDENCE

### A. The Nature of the Right of Independence.

INDEPENDENCE may be defined as *The right of a State to manage all its affairs, whether external or internal, without control from other States.* It is the natural result of Sovereignty, and is therefore predicated by International Law of all Sovereign States. Part-sovereign States are not fully independent, because by the conditions of their existence they are not allowed entire freedom of action in the department of external affairs. Independent and fully sovereign States are subject to restrictions imposed temporarily by events and circumstances, or permanently by their position as members of a society of nations, and therefore bound to respect the rights of their fellow-members. But such restraints are necessary conditions of social life, and not legal incidents of the political existence of the communities subjected to them. They are not held, therefore, to derogate from complete independence. They spring from

(1) Treaty Stipulations.

These may be

(*a*) Freely entered into in order to solve a present difficulty by submitting for the future to some restraint upon liberty of action, as when by the Declaration of 1904 France agreed that she would not obstruct the action of Great Britain in Egypt, and Great Britain promised in return not to obstruct the action of France in Morocco.

(*b*) Imposed by superior force upon a State in no condition to resist, as when in 1895 Russia, France, and Germany insisted upon the restoration to China by Japan of Port Arthur and the Liau-tung peninsula, which the latter power had just acquired by the Treaty of Shimonoseki.

(2) The Corresponding Rights of other States.

Anarchy would result if every State shaped its policy without reference to the rights, interests, and susceptibilities of its neighbours. The right of independent action possessed by every sovereign State is therefore limited by the duty of not threatening the safety or outraging the honour of other members of the family of nations.

(3) The Superintending Authority exercised by the Great Powers.

The six Great Powers of Europe assume in the settlement of certain great European problems, such for instance as those connected with the Eastern Question, a primacy which other States tacitly recognise by accepting as a matter of course the arrangements made by them. And their authority is felt in many Asiatic and African matters also, though in some of these the United States of America, or Japan, or both, would claim to share their deliberations. On the American continent the United States holds a position corresponding, though not very closely, to that of the six Great Powers in Europe. In questions which concern the whole body of civilised States the eight Great Powers of the World are beginning to take the lead.

## B. **Intervention.**

Sometimes a State or a group of States interferes by force or threat of force in the internal concerns of another State, or in questions arising between other States. Such interference is called Intervention. It must be distinguished from Mediation and Arbitration. The former takes place when a State makes suggestions for the settlement of a quarrel, at the request of the parties to it, but without any intention of compelling them to accept its suggestions; the latter occurs when the parties themselves agree to refer their dispute to the judgment of others, on the

understanding that the decision rendered will be accepted by both sides. The essence of Intervention is a curtailment of the independent action of the State or States against which coercion is used or threatened. Therefore cogent reasons are necessary to justify it. Many justifications have been alleged; but the only grounds consistent with the principles on which International Law is founded are

(1) Treaty-right.

When a State has obtained by treaty certain rights with respect to another State, or has guaranteed the territorial integrity of another, or the succession to its throne, or indeed any important arrangement concerning it, a right to intervene is thereby gained in the event of the arrangement in question being threatened by internal violence or external attack. The threat of Great Britain to give armed assistance to Belgium in 1870 in case Belgian territory was violated by France or Prussia, then at war with each other, was justified by her signature to the treaties of 1831 and 1839, which guaranteed the independence and integrity of the Belgian Kingdom.

(2) Vindication of a violated principle of ordinary International Law.

This was the justification of the pressure put by Great Britain on Turkey in 1906 in order to frustrate the attempt of the Sultan to alter in his own favour the eastern frontier

of Egypt, and also of the pressure put by the United States on Napoleon III. of France from 1862 to 1867 to make him withdraw his forces from Mexico.

(3) Self-preservation or the Preservation of the Society of Nations.

The ordinary rule of non-intervention may be set aside when the life of a nation, or its honour, or some essential interest, is at stake; and similarly the Society of Nations may be protected against serious injury by an act of intervention. Among the reasons given for the intervention of the United States in 1898 between Spain and Cuba was the injury caused by the struggle to the peace, safety, and commerce of American citizens.

The first and second of these grounds of justification for Intervention are technically sufficient, but not always morally convincing. Each case must be judged on its own merits. The third ground is irrefragable, provided that the danger to be guarded against is sufficiently serious, and also direct and immediate, not conditional and remote. Other grounds, such as the request of one of the parties, and the putting down or upholding of Revolution, have often been alleged, but they are inconsistent with admitted principles. Even Interventions to stop proceedings repugnant to humanity can hardly be brought under ordinary rules, though they may be more than justified in exceptional circumstances as acts above and beyond law.

### C. General Considerations Applicable to Intervention.

The whole subject is full of difficulty. Practice alone is not a safe guide, for powerful States have too often been eager to intervene when they saw advantage to themselves in coming forward, and have justified their proceedings on specious but flimsy grounds. Moreover, Intervention is often undertaken on several grounds, or by several States acting together, but from different motives and with different objects. In forming a judgment it must be remembered that

(1) Interventions carried on by the Great Powers, as in some sort the representatives of civilisation, or by some State or States acting as their agent, are more likely to be just and beneficial than Interventions carried on by one power acting for itself only.

(2) Interventions by a temporary alliance of States have none of the authority attaching to the proceedings of the Great Powers, and are apt to end in disagreement, or even war, between the allies.

(3) Interventions in the internal affairs of States are greater infringements of their Independence than interference with their external action, and therefore require more weighty reasons to justify them.

The doctrine of absolute Non-intervention resulted from too great a reaction against the practice of indiscriminate Intervention. It is really based upon the assumption that a State has no duties to other States and to the great family of nations, a proposition which seems to carry with it its own condemnation.

### Questions

1. Define the Right of Independence as possessed by sovereign States, and show how it may be restricted by special agreement without derogating from their sovereignty. Give instances of restrictions imposed by Treaty.
2. Prove that the authority exercised by the Great Powers sometimes limits the freedom of action of the smaller independent States.
3. What is Intervention? When do you consider it justifiable? Is it lawful to intervene in order to uphold the Balance of Power?
4. Discuss the doctrine of Non-intervention.

### Hints as to Reading

In Pt. I. of Hall portions of Ch. II. should be read, and in Pt. II. the whole of Ch. VIII. In Westlake's *International Law*, Chs. V.-VII. of Pt. I. deal with our present subject, as also do Chs. VIII. and IX. of the same author's *Chapters on the Principles of International Law*, and portions of Ch. II., Pt. I., Vol. I., of Oppenheim. The theory of the Primacy of the Great Powers is set forth

by Lawrence in Pt. II., Ch. IV., of his *Principles of International Law* (4th ed.), and in Ch. I. of the same Part he discusses Intervention. The diplomatic history of the interference of the Powers in the affairs of the Turkish Empire is given in Holland's *European Concert in the Eastern Question.*

## CHAPTER II

### RIGHTS AND OBLIGATIONS CONNECTED WITH PROPERTY

### A. Proprietary Rights of States.

STATES as corporate bodies are capable of owning property. Indeed our present International Law is to a great extent based upon the assumption that they possess proprietary rights over portions of the earth's surface, which rights are quite compatible with private ownership of land. Though the notion of territorial sovereignty is comparatively modern, it dominates so completely the rules observed between civilised States that it would be impossible for a nomadic tribe to come under them. A State's possessions may be territorial or non-territorial. Its non-territorial property consists of buildings and chattels, the rights of ownership over which are as a general rule matters between a government and its subjects. Public International Law does not deal with them, except in the case of belligerent capture, which, being a matter between hostile States, is treated of under the Law of War. A State's territorial

possessions are made up of land and water. Quite recently the question has arisen whether the air above them is included. The point is too new to have been settled by general assent. But it may be taken for granted that, if territorial rights are conceded, other States will obtain something like the Right of Innocent Passage (see p. 59) for wireless messages and balloons, and, if the freedom of the air is recognised, it will be qualified by a right of each power to protect itself from such use by others of the atmosphere above its territory as would injure it or its subjects. At present the territory of a State consists of

(1) The land, lakes, and rivers within that portion of the earth's surface which it holds by legal title.
(2) The sea within a three-mile limit of its shores, and the narrow straits and bays along its coasts.

It must be noted that

(*a*) The three-mile limit was originally fixed because it was coextensive with the range of artillery, and there is a tendency now among jurists and statesmen to favour an extension of marginal waters corresponding with the increased range of modern guns.
(*b*) When a strait is six miles or less in width, and both its shores belong to the same power, it is a part of the territorial

waters of that power. If the opposite shores are owned each by a different power, the waters are still territorial, but they are divided between the two powers. Sometimes custom and general consent make a wider strait territorial.

(*c*) It is often said that all bays, when the line drawn from headland to headland across the entrance is more than ten miles in length, are in law parts of the open sea, and free from the territorial authority of any power. But this rule, though general, is by no means universally accepted, and there are many exceptions to it.

(3) Islets fringing its coast. They are held to accrue to, or be attendant upon, the main mass of its territory.

## B. **Modes of Acquiring Territory.**

International Law recognises as valid the title to territory which has been acquired in any of the following ways.

(1) Occupation.

This applies only to territory not held by a civilised State. Numerous controversies arose in the past as to the manner in which a valid title to such territory can be acquired; and in view of the modern scramble for Africa the question has regained its

ancient importance. Several points connected with it are still unsettled; but probably what follows would be regarded as a fair statement of the rules which are supported by the best practice and the most respected authority. Title to territory open for appropriation is gained, not by Discovery, but by Occupation. Occupation may be described as *annexation* plus *settlement*. *Annexation* is a formal act, whereby the annexing State notifies its intention of incorporating the annexed territory with its dominions. Hoisting the national flag and reading a proclamation are the usual formalities, and they are gone through by officers specially commissioned to perform them. If subordinate authorities, acting on their own initiative, annex previously unoccupied territory, their act has no international validity unless ratified by the supreme government of the State. Annexation must of necessity be an act of the State. If attempted by private persons it is null and void. *Settlement* is the physical possession of a territory by the planting therein under some kind of civilised government, however rudimentary, of civilised inhabitants, whether private persons, or officials, or both. It must be, if not continuous, at least intermittent. Entire abandonment for a considerable time will cause the abandoned territory to become again open to occupation. Annexation and settlement must coexist in order to bring

about valid Occupation; but it is immaterial which of the two precedes the other. The title gained by Occupation gives a right to a wider extent of territory than that which is covered by the original settlements; but many disputes have arisen out of attempts to define the area to which this doctrine of reasonable extension applies. To avoid such difficulties with respect to a part of the only large division of the earth's surface where they are now likely to occur, the General Act of the West African Conference of 1885 provided that each of the signatory powers should notify to the others any acquisition of fresh territory on the coasts of Africa, and it was understood that "a certain determination of limits" should always accompany the notification. It was agreed, further, that the powers were bound to ensure the establishment, in the regions occupied by them on the African coast-line, of authority sufficient to protect existing rights, and freedom of trade and transit. When this is done, what is called Effective Occupation is brought about.

There is a strong tendency to make these African rules general in their application. Meanwhile it would be wise for States to agree upon the boundaries within which they shall be free to occupy territory in countries newly opened to the enterprise of civilised mankind. This was done, for instance, with regard to

Eritrea and the Soudan by Great Britain, Italy, and Abyssinia in 1902, with regard to East Africa and South-West Africa by Great Britain and Germany in 1890, with regard to West Africa by Great Britain and France in 1889, 1890, 1898, 1899, and 1904, and with regard to South Africa by Great Britain and Portugal in 1891. The tribes inhabiting such territories, being incapable of entering into the relations that subsist between subjects of International Law, are ignored in so far as the law is concerned with the creation of a valid title to territory as between civilised powers. But the fact that some sort of consent has been obtained from them in most of the recent Occupations is an acknowledgment of the duty of treating native races with justice. Probably the civilised parties to such agreements can gain no more by them than a moral claim to anticipate other civilised powers in Effective Occupation.

(2) Accretion.

This occurs when the action of water adds to the land, or when islands are formed close to the territory of a State, or when human agency causes the formation of new land by embankment or otherwise.

(3) Cession.

This is the formal transfer of territorial possessions by one State to another. It takes

place in consequence of transactions of various kinds, such as sale, gift, whether free or forced, and exchange. In most cases cession is made by a State defeated in war as part of the price of peace.

(4) Conquest.

This is the retention of territory taken from an enemy in war, and the exercise therein of all the powers of sovereignty, with the intention of continuing to do so permanently, which intention is usually set forth in a Proclamation or some other legal document. Good examples are to be found in the annexations of the Transvaal and the Orange Free State by Great Britain in 1900. Conquest in the jural sense differs from Cession by forced gift in that there is no formal international transaction which marks the exact time of the commencement of the new title, and from Conquest in the military sense in that it involves permanent rule over the territory. When a Conquest in the military sense of part of a State's territory is confirmed by treaty of peace, the title to the conquered part is one of Cession, not of Conquest in the legal sense.

(5) Prescription.

This occurs when a State has held for a great length of time territory with regard to which it can show no other ground of title

known to International Law. The principle is recognised in order to avoid disputes about ownership; but no definite rules have been accepted as to the duration of the possession necessary to give a valid title.

### C. Different Degrees of Power over Territory.

States have begun to reserve for themselves territories over which they do not for the present exercise full rights of sovereignty. This has given rise to fresh problems with regard to the exact nature of their powers over the districts they claim. A State may exercise authority over territory as

(1) A part of its Dominions.

In this case its powers are those of full sovereignty, both internal and external. (See Pt. I., Ch. III.) A *condominium*, such as that established by Great Britain and Egypt in the Soudan by the Convention of 1899, means that the powers of sovereignty are exercised conjointly by the governments of the States concerned, not that there are two sovereigns in one territory.

(2) A Leased Territory.

The question of international leases has been brought into prominence by recent transactions. We may cite as examples the leases granted by China in 1898 of Kiao-

Chau to Germany, Port Arthur to Russia, and Wei-Hai-Wei to Great Britain. In practice these proceedings amounted to a more or less complete surrender of sovereignty by China. Port Arthur, for instance, during the war of 1904-1905, was attacked by Japan and defended by Russia just as if it were a portion of the Russian Empire, China remaining neutral during the war. And by the treaty of peace Russia transferred the lease to Japan. We cannot, therefore, say that the lessor State retains sovereignty over the leased territory, as the lessor in a private transaction retains the ownership of the leased property, the use only passing to the lessee. In fact the so-called international leases are in reality cessions of territory for a term of years, and it may be added that restoration at the end of the term is often somewhat problematical.

(3) A Protectorate.

The word may be used to describe either a certain relationship between two States known to International Law, or a certain attitude on the part of a civilised State towards territories inhabited by a population too primitive to be organised as a State of International Law. The latter are sometimes called Colonial Protectorates. Over Colonial Protectorates the protecting State exercises powers of external sovereignty. Internal affairs are left in a greater or less degree to the local chiefs and

headmen; but at least enough control over them must be taken to enable the protecting State to fulfil its obligations to other States in respect of the Protectorate. The protecting power has a right to require of other powers abstention from any attempt to acquire the protected territory, and from any direct political dealings with its inhabitants. On the other hand, it is bound to restrain those whom it protects from committing acts of hostility against neighbouring powers. Protectorates of the first kind are dying out. But Colonial Protectorates are growing in number, and the exact limits of the rights and duties of a protecting State towards foreign countries and their subjects have not yet been settled.

(4) A Sphere of Influence.

This phrase applies to districts which are largely unoccupied even by the power to which they are assigned, and are entirely free from the occupation of other powers. Over territory included in the Sphere of Influence of a State it does not necessarily exercise any direct control in either external or internal affairs; but it claims that other States shall not acquire dominion or establish Protectorates therein, whereas it is free to do so if it chooses. The validity of such a claim depends entirely on agreement. International Law gives to every civilised State a right to acquire unappropriated territory by Occupation and to

establish Protectorates; but it can contract itself out of these rights with regard to certain districts in consideration of being allowed a free hand in other parts, and, when it has done so, it is bound by its treaty stipulations in this as in other matters. The last few decades have seen the making of many such agreements, in order to avoid present disputes and possible wars in the future. Each binds only the parties to it and those other States which may recognise the arrangements arrived at. Good examples are to be found in the agreements made by Great Britain in 1890 with France and Germany, and in 1891 with Italy and Portugal, for the delimitation of their respective Spheres of Influence in large parts of Africa.

Spheres of Influence tend to become Colonial Protectorates, and Colonial Protectorates tend to develop into Colonies held in full dominion by the mother country. The plan adopted by Great Britain and several other States of allowing Chartered Companies to assume in the first instance powers and responsibilities which the Government hesitates to take upon its own shoulders, does not succeed in divesting the State of international burdens and obligations, and sometimes gives rise to disputes like the controversy of 1898 with France as to part of the territory claimed by the Royal Niger Company.

Besides the forms of power over territory already

described, there are others of a less important nature. The only one of these it is necessary to mention is the Right to Occupy and Administer. This was given to Austria as regards the Turkish provinces of Bosnia and Herzegovina by the Treaty of Berlin of 1878, and to Great Britain as regards Cyprus by a Convention of the same year. In both cases the sovereignty reserved to the Sultan was little more than a name, and in the first case it disappeared altogether in 1908, when Austria annexed the occupied provinces.

### D. Questions connected with the Claims of States to Territorial Rights over Waters.

The claims of States to territorial rights over waters have led to the raising of a number of questions, some of which have only an historical interest, while others are matters of the utmost importance to-day. We will consider them in the following order.

(1) Claims to Sovereignty over the High Seas, and the Natural Straits which connect them.

In the middle ages many maritime States claimed territorial sovereignty over large tracts of open sea; but with the rise of modern International Law these claims were disputed. They have gradually become extinct, and the principle that the High Seas may not be appropriated by any power is now universally recognised. The last remnant

of the old doctrines vanished when in 1893 an Arbitral Tribunal sitting at Paris decided against the American claim to exercise authority over Behring Sea for the purpose of putting down pelagic sealing. Territorial rights over narrow straits connecting two open seas still remain; but they are limited by the Right of Innocent Passage, and the territorial power may not even levy tolls for profit.

(2) The Nature and Extent of the Right of Innocent Passage.

This may be defined as the right of free passage through the territorial waters of friendly States, when they form a channel of communication between two portions of the open sea. It is possessed by vessels of all States at peace with the territorial power, on condition that no acts of hostility are committed during the passage. It applies to ships of war as well as to merchant vessels. The rules forbidding the former, with certain exceptions, to pass up and down the Dardanelles and the Bosphorus rest upon special agreements, negotiated in 1856 and 1871, and not on the common law of nations.

(3) The Position in International Law of Inter-Oceanic Canals.

The construction of the Suez Canal raised this question. International Law provided no rules for the use of so unprecedented a work. It was therefore necessary to settle its status

by treaty stipulations. After negotiations extending over many years, a Convention was signed in 1888 by the representatives of the six Great Powers, and Turkey, Spain, and the Netherlands. By this instrument the Canal was neutralised. That is to say, it was opened in time of war as well as in time of peace to all ships, whether merchantmen or vessels of war, whether belligerent or neutral; but no acts of hostility were to be committed either in the Canal, or in its ports of access, or in the sea to a distance of three miles from those ports, nor was the Canal to be blockaded. These rules have worked well; and the Agreement of 1904 between England and France as to Egypt and Morocco removed the last difficulty in the way of their regular application. By the Hay-Pauncefote Treaty of 1901 they were applied with few changes to the Panama Canal now in course of construction by the Government of the United States.

(4) The Use of Sea Fisheries.

When a fishery exists in the territorial waters of a State, its exclusive use belongs to subjects of that State; but outside territorial waters the subjects of all States are free to fish where they please. These simple rules are, however, often modified by conventions giving to subjects of one power the right to fish in certain specified portions of another's marginal waters. Sometimes great disputes

arise as to the interpretation to be put upon these concessions, a good example being the controversy which was settled in 1904, but which had previously gone on for generations between Great Britain and France, with regard to the exact nature and extent of the rights given to French fishermen along a portion of the coast of Newfoundland by the Treaty of Utrecht of 1713 and subsequent agreements.

(5) The Navigation of International Rivers.

When a great navigable river flows through the territory of two or more powers, or forms the boundary between them, it is sometimes asserted that all the riparian States, or indeed all States, possess a right of free navigation on its waters. But the better view is that, strictly speaking, International Law confers no such right upon them. Within the last hundred years, however, it has been given by special treaty in so many cases that it could hardly be withdrawn now, and we may confidently expect it to become universal at no very distant date.

## Questions

1. How far do the proprietary rights of States extend over seas and other waters?

2. What is required of a State in order that it may gain a valid title to territory by Occupation? Give what seem to you the best methods of decid-

ing how much territory is gained by a single act or series of acts of occupation.

3. Endeavour to assign a meaning to the expression, Sphere of Influence. How far does International Law concern itself with (*a*) Protectorates, (*b*) Spheres of Influence?

4. Consider the mutual rights and obligations of two riparian States, when the river flows during a portion of its course through the territory of one, and during the remainder through the territory of the other.

## Hints as to Reading

In Hall, Chs. II. and III., and also parts of Ch. VI., of Pt. II., and in Wheaton, Ch. IV. of Pt. II., should be read. Westlake discusses the questions raised in the foregoing chapter in Chs. V.-IX. and Ch. XV. of Pt. I. of his *International Law*, and investigates at length the acquisition of territorial sovereignty over uncivilised regions in Ch. IX. of his *Chapters on the Principles of International Law*. Pt. II., Ch. II., of Lawrence's *Principles of International Law* (4th ed.) will be found useful, as also will Pt. II., Chs. I. and II. of Vol. I. of Oppenheim, and Ch. VI. of Halleck. Maine refers to territorial rights in Lectures III. and IV. of his *International Law*. Phillimore's *Commentaries*, Pt. III., may be used as a book of reference for instances of conflicting claims as to waters, and of the various modes of acquiring territory.

## CHAPTER III

### RIGHTS AND OBLIGATIONS CONNECTED WITH JURISDICTION

### A. General Rules on the Subject of Jurisdiction.

JURISDICTION is in the main territorial. Speaking generally, a State exercises jurisdiction over all persons and things within its territory. It has also a non-territorial jurisdiction, which it exercises chiefly, though not exclusively, over its own subjects by virtue of the tie of allegiance between it and them. With regard to territorial jurisdiction, we may lay down that each State has jurisdiction over

(1) All Persons within its Territory, with certain exceptions.

For purposes of jurisdiction persons within the territory of a State may be divided into the following classes:

(*a*) Natural-born subjects. Each State defines by its municipal law what circumstances of birth shall make a given individual its subject. Great Britain regards as subjects children born within

the British dominions, whatever their parentage, and children of British parents, wherever born, and even those whose Father or Grandfather on the Father's side were British. It is only when two or more States claim the same individual that international difficulties can be raised.

(*b*) Naturalised subjects. These are persons between whom and the State the tie of citizenship has been artificially created. The law of each State prescribes the necessary conditions and formalities for the reception of foreigners as citizens; Great Britain accepts aliens who have resided for five years in the United Kingdom, or been for five years in the service of the Crown, on condition that they take the oath of allegiance and continue to reside or serve as before. In cases where a country does not recognise change of allegiance on the part of its subjects, or imposes conditions on such recognition, complications are apt to arise between it and States which have naturalised any of them.

(*c*) Domiciled aliens. These are persons of a foreign nationality who are permanently resident within a country. They are subject to its jurisdiction, but it cannot require from them purely political services. Their personal status

is determined either by its law or by that of their own country.

(*d*) Travellers passing through its territory. These are under its criminal jurisdiction, and for some purposes under its civil jurisdiction also, but neither their personal status nor their political rights are affected by its law.

(2) All Things within its Territory, with certain exceptions.

For purposes of jurisdiction things within the territory of a State may be divided into the following classes:

(*a*) Real property. This is entirely under the control of the State where it is situated.

(*b*) Ordinary Personal property. In cases in which the owner is domiciled within, and a subject of, the State where the property is situated the local law applies; but if the property is in one State and the owner is domiciled in another, the *lex domicilii*, or the law of the country of which the owner is a subject, prevails.

(*c*) Its own ships, both public and private, in its waters. The authority over them is complete, and extends to all acts done on board them.

(*d*) Foreign merchant vessels within its ports and territorial waters. They are subject to the local jurisdiction, if it is

exercised over them. If not, they are under the jurisdiction of the State to which they belong. Many powers, including Great Britain, exercise to the full their authority over foreign merchantmen in their territorial waters. But France refuses to take cognisance of acts done on board them, unless the peace of the port is threatened, or persons other than the crew are concerned; and the French practice has been followed by several States in recent times.

With regard to non-territorial jurisdiction, we may lay down that each State has jurisdiction over

(1) All its Ships on the High Seas.

There can be no territorial jurisdiction on the open seas. Each State, therefore, exercises jurisdiction over all persons and things on board its vessels navigating them. The doctrine that a ship is a floating portion of the territory of the State to which it belongs has been invented to account for this rule; but it is obviously a fiction, and moreover a clumsy one, for if consistently applied it would deprive belligerents of their undoubted right to search neutral merchant vessels.

(2) All its Subjects outside the Territory and Vessels under its Jurisdiction.

In virtue of the personal tie of allegiance States undoubtedly possess jurisdictional rights over their subjects in foreign territory, or on

board ships of a foreign State, or in countries belonging to no civilised power. But they do not as a rule attempt to exercise these rights, since in most cases the territorial jurisdiction is sufficient. They, however, punish political offences against themselves committed by their subjects abroad, and also grave crimes of a non-political character. Sometimes, too, they assume control over acts done by their subjects, and, by consent, over acts done by subjects of other States, in barbarous countries not under the dominion or protectorate of a civilised power. But, except in these last cases, they cannot deal with an offender unless he comes within the territory or the vessels subject to their jurisdiction.

(3) All Pirates Seized by its Vessels.

There are three distinguishing marks whereby piratical acts may be known. They must be acts of violence; they must be done outside the territorial jurisdiction of any civilised State, that is to say, in general terms, on the High Seas; and they must be committed by persons destitute of authorisation from any recognised political community. Piracy is a crime against the whole body of civilised States, and is therefore justiciable by the courts of any State whose cruisers can capture the offenders. It must, however, be noted that this applies exclusively to Piracy *jure gentium*. Other offences that are made Piracy by the municipal law of a State, must be dealt

with by its officers and tribunals only. The Slave Trade is not Piracy *jure gentium*. Consequently special treaty stipulations are required to authorise the capture of vessels engaged in it by cruisers of a State other than that to which the captured ships belong. Great Britain has taken the lead in negotiating such agreements, and mainly as the result of her efforts all the maritime powers have at length become parties to the Final Act of the Brussels Conference of 1890, which, among other means for the suppression of the African Slave Trade by land and sea, granted a modified Right of Search, applicable to vessels of less than five hundred tons' burden found within a maritime zone extending over the western part of the Indian Ocean.

Sometimes States claim to exercise jurisdiction over foreigners who have committed within foreign territory grave offences against themselves or their subjects; but it is very doubtful whether such jurisdiction is recognised by International Law. All belligerent States have a limited jurisdiction over neutrals in order to restrain and punish violations of belligerent rights.

### B. **Exceptions.**

There are exceptions to the rule that the jurisdiction of a State extends over all persons and things within its territory. These exceptions may be considered under the following heads:

(1) Foreign Sovereigns and their Suites.

When the head of a foreign State is visiting a country in his official capacity, he and his suite are entirely exempt from the local jurisdiction; but, on the other hand, he may not exercise any jurisdiction over his retinue, further than to send home for trial urgent cases that may arise among them.

(2) Diplomatic Agents of Foreign States.

They are for most purposes free from the local jurisdiction when residing abroad as the accredited representatives of their country. Their immunities will be considered when we come to the subject of Legation and Negotiation (Pt. II., Ch. v.).

(3) Public Armed Forces of Foreign States.

When two States are at peace, the forces of one in the territory of the other are exempt in a greater or less degree from the local jurisdiction. Land forces and sea forces must be dealt with separately.

(*a*) Land forces may not pass through the territory of a friendly State without express permission. In the absence of special agreement on the subject of the jurisdiction to be exercised over them, they are not amenable to the local law, but their own officers are responsible for their good behaviour.

(*b*) Sea forces require no special permis-

sion to enter the territorial waters of a friendly State; but they can be excluded from the ports and harbours of any power which gives formal notice of its intention not to allow them to enter. Within foreign territorial waters they are for most purposes exempt from the local jurisdiction. They ought, however, to respect the local law as far as possible; but the local authorities have no power to enforce it on board the ship, or take out of her persons who have found a refuge beneath her flag. They can but exclude the vessel, except in such extreme cases as the violation by a belligerent cruiser of the neutrality of friendly waters, when force may be used to prevent or avenge the outrage. Most States instruct their naval commanders to receive on board political offenders and fugitive slaves who fly to them for refuge from imminent danger, but no other persons.

(4) Subjects of Western States Resident in Eastern Countries.

They have obtained by special treaties exemption from the local jurisdiction, and are subject instead to the jurisdiction of Consular Courts or Mixed Tribunals, in such Eastern lands as have not come under Western rule, or adopted Western ideas in legal and

judicial matters. The system rests entirely upon convention, and varies considerably in different Oriental countries.

## C. Extradition.

Extradition is the surrender by one State to another of an individual who is found within the territory of the former, and is accused of having committed a crime within the territory of the latter, or who, having committed a crime outside the territory of the latter, is one of its subjects, and, as such, by its law amenable to its jurisdiction. The best authorities hold that in the absence of special treaty stipulations such surrender cannot be demanded as a right, though it may be granted as a matter of comity. Most civilised States are now bound to one another by Extradition Treaties, which generally, though not invariably, contain in some form the following stipulations:

(1) No one will be surrendered unless *prima facie* evidence of his guilt is given.
(2) No political offenders will be surrendered.
(3) No surrender will be made unless adequate assurances are given that the accused will not on that occasion be tried for any offence other than the crime for which he is surrendered.

Each treaty contains a list of the crimes on account of which surrender will be made. The

chief difficulty arises in clearly distinguishing political from other offences. The British courts have held that the connection of an act with a political movement of which it forms a part gives it a political character, and that there must be two or more parties in the State, each seeking to impose the government of their own choice on the other.

## Questions

1. Over what classes of persons does a State possess jurisdiction?

2. What is meant by naturalisation? Show how international complications have arisen as to subjects of one State naturalised in another.

3. For what reasons are Europeans exempt from the local jurisdiction in some Oriental countries? Describe briefly the system of jurisdiction under which they live.

4. What conditions have to be fulfilled before Great Britain will surrender to a foreign State a fugitive criminal found on British territory?

## Hints as to Reading

Hall in Pt. II., Chs. IV., V., and VI., covers the subjects touched on in our present Chapter. Westlake deals with them in Chs. VIII.-XI. of Pt. I. of his *International Law*; Oppenheim in Vol. I., Pt. II., Chs. II. and III., and Pt. III., Ch. I.; Halleck in Chs. VII. and XII.; and Wheaton in Pt. I., Ch. II. Lawrence's *Principles of International Law*, Pt. II.,

Ch. III. (4th ed.), goes over the same ground. Dana has some excellent notes on Piracy in his edition of Wheaton's treatise. The paper on *The Territoriality of the Merchant Vessel* in the Letters of Historicus is an able exposure of the fallacious theory that a ship is a floating part of the territory to which it belongs. Maine deals with the doctrine of ex-territoriality in Lecture IV. of his *International Law*.

## CHAPTER IV

### RIGHTS AND OBLIGATIONS CONNECTED WITH EQUALITY

### A. **The Doctrine of Equality.**

By the doctrine of the Equality of States is meant that all of them who are fully independent have equal rights in the eye of International Law, not that all are equal in power or influence. The great publicists who founded modern International Law made equality one of the fundamental principles of their system; but it may be questioned whether it is still applicable without qualification. During the past century the Great Powers of Europe have exercised in many matters of European interest a Primacy inconsistent with it. They have, for instance,

(1) Established and neutralised the kingdom of Belgium.
(2) Made periodical settlements of the Eastern Question.
(3) Received States previously accounted barbarous, such as Turkey, within the pale of International Law.

(4) Received a new power, Italy, within the ranks of the Great Powers of Europe.

These proceedings, which are only examples taken from many of a similar kind, changed the legal position of other powers without their express consent; and the fact that the altered state of things was tacitly accepted by the smaller States seems to show that a superintending authority of some sort is regarded by them as legally vested in the Great Powers. It is analogous to political control in a State, and is quite consistent with equality in such matters as jurisdictional and proprietary rights. It is, moreover, in a very rudimentary condition; but it is sufficiently marked to be noted as modifying the generally received doctrine of perfect Equality. The United States joined the Great Powers of Europe in the regulation of African Affairs at the Congo Conference of 1885, and again at the Morocco Conference of 1906. One can hardly conceive it possible that Japan as well as the United States would not be called into consultation if important matters in Eastern Asia came up for international settlement. She was summoned in 1908-1909, when questions of maritime warfare, important to the whole body of civilised States, were dealt with at a conference of leading naval powers. Something like the Primacy accorded in Europe to the Great Powers is claimed in America by the United States by virtue of what is termed the Monroe Doctrine. This expression of opinion as to the policy of the United States in

external affairs was originally a protest against any attempt to extend the European state-system to the American continent. But in the hands of the successors of President Monroe it has developed into an assertion of a superintending authority, especially over territorial disputes between American and European States.

## B. Rules of Ceremony and Etiquette.

Text-writers have generally discussed under the head of Rights of Equality matters of ceremony and etiquette, as being the outward signs of equality, or the reverse, in rank and consideration. And in cases where it is impossible to give the same treatment to all, as, for instance, in the ordering of State festivals or the signing of international documents, rules have been established for reconciling the theoretical equality of States with some recognised order of precedence. We may consider them briefly under the following heads:

(1) Rules of Precedence for Sovereigns and their Representatives.

Sovereigns who are crowned heads take precedence of those who are not; but powerful Republics, such as France and the United States, rank along with the great monarchical States. The *alternat* and other devices are used to determine the order of the signatures to a great international document. The rank of the regular diplomatic agents of States is

fixed by general agreement. The rules respecting it will be given when we come to deal with Legation and Negotiation (Pt. II., Ch. V.).

(2) Titles and their Recognition by other States.

Each State confers what titles it pleases upon its ruler; but other States are not bound to recognise a new title, and they may impose conditions as the price of recognition.

(3) Maritime Ceremonials.

These are salutes to the national flag exchanged between ships, or between ships and forts. They were once considered as involving important international questions, but are now regarded simply as matters of courtesy. There are many rules concerning them. For instance, ships of war entering a foreign port salute first, unless the Sovereign or his representative is on board. When public vessels of different nationalities meet at sea, the ship of whichever of the two commanders is inferior in rank salutes first. In all cases salutes are returned, gun for gun.

All these ceremonial matters have lost the importance they once possessed. A good many disputes concerning them have been amicably settled; and it is hardly likely that the peace of nations will be seriously disturbed by them in the future, as it has sometimes been in the past.

## Questions

1. Examine the doctrine of the Equality of States.

2. What are the chief rules of precedence for States and Sovereigns?

3. Write down the various devices for avoiding difficulties connected with the order of signing international documents.

4. Give the most important of the rules which govern maritime ceremonial.

## Hints as to Reading

Questions of Primacy and Ceremonial are considered by Lawrence in Pt. II., Ch. IV. (4th ed.), and by Oppenheim from a different point of view in Vol. I., Pt. I., Ch. II. In Westlake's *International Law*, the last part of Ch. XIII. of Pt. I. will be found useful; and in the same author's *Chapters on the Principles of International Law*, Ch. VII. discusses the equality of States. Ch. V. of Halleck will be found useful, and also Pt. II., Ch. II. of Wheaton.

## CHAPTER V

### RIGHTS AND OBLIGATIONS CONNECTED WITH DIPLOMACY

### A. Diplomatic Intercourse.

STATES now carry on their ordinary diplomatic intercourse by means of agents permanently resident at each other's courts. The practice of maintaining such agents is comparatively modern. It was begun in the fourteenth century by the great Italian Republics, and in the fifteenth by Louis XI. of France; but its general adoption dates only from the Peace of Westphalia of 1648. We must consider with regard to Diplomatic Agents

(1) The Classes into which they are divided, and their Relative Rank.

These questions gave rise to an immense number of disputes, till they were finally settled by the Congress of Aix-la-Chapelle in 1818. It was then agreed that Diplomatic Agents should be divided into four classes:

(*a*) Ambassadors and Papal Legates or Nuncios.

(*b*) Envoys and Ministers Plenipotentiary accredited to Sovereigns.

(*c*) Ministers Resident accredited to Sovereigns.

(*d*) Chargés d'Affaires accredited to Ministers of Foreign Affairs.

These classes rank in the order in which they are given above; and the members of any class take precedence among themselves according to the length of their residence at the court to which they are accredited. Only a few of the most powerful States send Ambassadors. Part-sovereign States do not possess full Rights of Legation and Negotiation.

(2) The Obligation to receive them.

A State which declined to carry on diplomatic intercourse with other States would put itself *ipso facto* outside the pale of International Law. But diplomatic relations between two States may for adequate reasons be broken off temporarily. Such a proceeding is, however, a sign of a grave difference between the two powers, and is often followed by war. On the other hand, a refusal to receive a particular person as diplomatic representative from another State is no just ground of offence, if the individual in question is

(*a*) Personally obnoxious to the Sovereign to whom he is accredited.

(*b*) One of the subjects of the State to which he is sent.

(*c*) Openly and avowedly hostile to the State to which he is sent or to its form of government.

For similar reasons a State may demand the recall of a diplomatic representative resident at its court; and in extreme cases it is justified in dismissing him, or even in sending him out of the country.

(3) The Formal Observances connected with their Reception and Departure.

A diplomatic minister receives from his own government on his appointment

(*a*) A Letter of Credence, setting forth the objects of his mission, and requesting that full credit be given to what he says on behalf of his Sovereign.

(*b*) Full Powers, giving him authority to act. In the case of a permanent legation at a foreign court, diplomatists are furnished, as a rule, with Letters of Credence, but not with Full Powers, unless a specific treaty is to be negotiated. In the case of a Conference, the plenipotentiaries generally take with them Full Powers, but not Letters of Credence.

(*c*) Instructions giving directions for his guidance in the negotiations he undertakes.

(*d*) A Passport, authorising him to travel to his destination.

On his arrival he presents his Letter of Credence at an audience of the Sovereign, unless he be a Chargé d'Affaires, in which case he has audience of the Foreign Minister only. A similar ceremony is gone through on his departure at the termination of his mission.

### B. **Diplomatic Immunities.**

While resident at foreign courts diplomatic ministers are exempt in a very great degree from the operation of the local law. Their persons are inviolable, unless they are actually plotting against the security of the State to which they are accredited, in which case they may be arrested and sent out of the country. They are free from legal processes directed against the person, unless they voluntarily consent to waive their privilege and appear in court. Their wives, families, and servants share their immunities to a very considerable, though ill-defined, extent. Their property, too, has many immunities, especially the Hotel, or official residence. For most purposes it is under the jurisdiction of the State which the embassy represents, and except in extreme cases it may not be entered by the local authorities. For the purpose of detailed consideration diplomatic immunities may be classified as follows:

Connected with the Person:

(1) Immunities of the minister, and those of his suite who possess the diplomatic character.

(2) Immunities of his wife and children, those of his suite who do not possess the diplomatic character, and his servants.

Connected with Property:

(1) Immunities of the Hotel, and other property belonging to the embassy.

(2) Immunities of the private property of the minister in the country to which he is accredited.

(3) Immunities of goods sent from abroad for the use of the embassy.

### C. Consuls.

Consuls are commercial, not diplomatic, agents. They reside abroad for the purpose of protecting the individual interests of traders, travellers, and mariners belonging to the State which employs them. They are under the local law and jurisdiction, and their residences are not, as a rule, held to be free from the authority of the local functionaries. But their official papers are not liable to seizure, they may not be compelled to serve in the army or militia, and soldiers may not be quartered in their consulates. In many Oriental countries, however, special treaties give to the consuls of the Western Powers a privileged position.

They exercise jurisdiction over their countrymen, their persons are inviolable, their residences may be used as asylums in the case of war or tumult, and in fact they possess more than the ordinary diplomatic immunities.

### D. **Treaties.**

The treaty-making office in each State rests with those authorities to whom it is confided by the constitution of the State. As long as there is some power whose word can bind the whole body politic, foreign States have no right to enquire further. But other important matters connected with treaties are of international concern. We will consider them in the following order:

(1) The Nature and Necessity of Ratification.

Ratification is a formal ceremony whereby, some time after a treaty has been signed, solemn confirmations of it are exchanged by the contracting parties. No treaty is binding without ratification, unless there is a special agreement to the contrary. In discussing the question whether a State is bound to ratify, two classes of cases must be considered.

(*a*) When the ratifying power and the treaty-making power are vested in different authorities. In this case there can be no obligation to ratify; for other States know from the beginning that they have to secure the assent of both authorities.

(*b*) When the ratifying power and the treaty-making power are vested in the same authority. Here there is more doubt. Some contend that, unless circumstances materially alter in the interval between negotiation and ratification, the latter cannot be withheld. But modern practice seems to support the theory that if, after the signature of a treaty, a State changes its mind from any reason other than mere caprice, it may refuse to complete the bargain by ratification.

(2) The Rules of Interpretation to be applied to Treaties.

The older text-writers spent a vast amount of ingenuity on this subject; but, since there is no international tribunal to enforce rules of interpretation, disagreements as to the meaning of treaties have to be settled by fresh negotiations between the States concerned, and are often decided according to the convenience of the moment, rather than in accordance with the principles of grammar or logic. All we can venture to lay down is that ordinary words should be taken in their ordinary sense, and technical words in their technical sense, and that doubtful sentences and expressions should be interpreted by the context, so as to make the treaty homogeneous, and not self-contradictory.

(3) The extent to which Treaties are binding.

In the eye of International Law the obligation of treaties is perpetual, unless they are destroyed by war, or a time is limited in their stipulations, or they provide for the performance of acts which are done once for all, such for instance as the payment of an indemnity. But it is obvious that as circumstances alter, the engagements made to suit them get out of date. The question of when a treaty is obsolete, and under what circumstances it may be broken or ignored, is one of morality, not of law. Wars and other events are constantly modifying international arrangements. Each change must be judged on its own merits, bearing in mind on the one hand that good faith is a duty incumbent upon States as well as individuals, and on the other that no age can be so wise and good as to make its treaties the rules for all succeeding time.

## Questions

1. Trace the growth of the practice of sending permanent embassies to reside at foreign courts. How do diplomatic ministers rank among themselves?

2. What are the formalities observed at the reception and departure of a diplomatic minister?

3. Discuss the extent of the authority possessed over the person and the Hotel of a diplomatic minister by the State to which he is accredited.

4. Is a State bound to ratify the treaties into which it has entered?

## Hints as to Reading

In Hall's Pt. II., portions of Ch. IV. and the whole of Chs. IX. and X., in Westlake's *International Law*, Pt. I., Ch. XII., in Oppenheim, Pt. III. of Vol. I., and in Lawrence, Pt. II., Ch. V. (4th ed.), should be read. Pt. III. of Wheaton deals with our present subjects. Dana's note on *Diplomatic Immunity* should be read by those who have access to it. Much valuable information will be found in Halleck, Chs. VIII.-XI.

# PART III

# THE LAW OF BELLIGERENCY

# CHAPTER I

## THE DEFINITION OF WAR AND OTHER PRELIMINARY POINTS

### A. The Nature of War.

WAR may be defined as *A contest carried on by public force between States, or between States and communities having with regard to the contest the rights of States.* This definition excludes Private Wars, which have long been obsolete in Europe, and it also ignores the idea of war as a punishment. Modern International Law does not attempt to decide upon the justice or injustice of war in general or any war in particular. It leaves such questions to International Morality, and deals only with the creation of the relation of belligerency, and the legal effects thereby produced. These are the same in all wars, whether morally just or morally unjust.

War must be distinguished from forcible modes of obtaining redress which are held not to be inconsistent with the maintenance of peaceful relations between the State which inflicts them and the State which suffers from them. These methods

are sometimes spoken of generically as Reprisals. But the term is very loosely used. There used to be special reprisals and general reprisals, positive reprisals and negative reprisals. Even now we apply the word to those breaches of the laws of war which are committed during hostilities in retaliation for similar breaches committed by the enemy. From these, which are acts of war, the reprisals we are now considering, which are acts of force committed in order to prevent war, must be clearly distinguished. Examples of the latter may be found in the capture of Sicilian ships by England in the Mediterranean in 1840, the bombardment of the Chinese arsenal of Foo-Chow by a French fleet in 1884, and the seizure of the island of Mitylene by an international squadron in 1905. In none of these cases was peace technically broken, and in all the power which resorted to the Reprisals received satisfaction for the acts of which it complained. Reprisals, considered as comprising all international acts of force which are not acts of war, include a great variety of operations. Two of them require special mention.

(1) Embargo.

Here again we have an ambiguous term. The word means detention, and the detention by a State of its own ships in its own ports is sometimes called Pacific Embargo. As applied to an act of force falling short of war, it is, strictly speaking, Hostile Embargo, and signifies the seizure of all the ships of the offending nation found in the ports of the

aggrieved State, as, for instance, the seizure by Great Britain in 1840 of all Neapolitan ships found in the waters of Malta.

(2) Pacific blockade.

Pacific blockades differ from blockades carried on as warlike operations in that the ships of third powers cannot be seized by the blockaders, whereas in blockades carried on as part of the operations of a war neutral vessels which attempt to run in or out of a blockaded port may be captured and sequestrated. The powers which carry on a pacific blockade have no right to interfere with trade other than their own and that of the offending State. In 1886 the Great Powers, with the exception of France, blockaded pacifically a portion of the coast of Greece, and detained none but vessels under the Greek flag. In 1897 the Admirals engaged in the pacific blockade of Crete on behalf of the Great Powers claimed to prevent access to the island by any vessels, no matter what their nationality, if their cargoes were destined for the interior, which was held by the insurgents, or for the Greek troops who had landed upon the island. But the circumstances were wholly abnormal, in that Turkey, the territorial power, consented to the blockade. In ordinary cases between State and State the rule just mentioned will apply.

All the forcible modes of obtaining redress

which hover between peace and war are abnormal, and capable of abuse. But International Law allows them, and they are sometimes useful as a means of bringing pressure to bear upon weak governments with less suffering than war would produce. A powerful State exposed to such treatment would undoubtedly retaliate by prompt hostilities.

### B. **Declarations of War.**

Text-writers are divided as to the necessity of making formal Declarations of War. A review of the practice of States shows that in modern times such Declarations have been comparatively rare, and when used have sometimes been made after the outbreak of hostilities. In popular estimation war without Declaration is confused with war without warning. But it is obvious that the most formal notification does not put the other side on its guard when it accompanies or follows the first attack. What is wanted is to make treachery, which has been very rare, practically impossible. This was done by the Second Hague Conference in 1907. Its convention relative to the opening of hostilities provided that they should not commence "without previous and explicit warning, in the form either of a reasoned declaration of war or of an ultimatum with conditional declaration of war." Thus a bolt out of the blue is forbidden; and it is secured that reasons for the war shall be given formally and officially. Moreover, the difficulty of settling the exact moment when the state of war supersedes the previous

condition of peace is surmounted, since the change dates from the delivery of the declaration. Neutral powers are to be notified of the outbreak of war, and it does not take effect with regard to them till they know of it. The first attack can follow the declaration immediately; but it is obvious that some statement of grievances and demand for redress must have preceded a document which is bound to be "reasoned."

## C. Recognition of Belligerency.

Every recognised State obtains as a matter of course all the rights of a belligerent if it chooses to go to war; but when a community, not being a State in the eye of International Law, resorts to hostilities, it may be endowed with the rights and subjected to the obligations of a State in respect of its naval and military operations, if other powers accord it what is called Recognition of Belligerency. They ought not, however, to do this unless their interests are affected by the struggle, and the community recognised

(1) Possesses Territory.
(2) Is ruled by an organised Government.
(3) Carries on War in a Civilised Manner.

Recognition of Belligerency in any other circumstances is an unfriendly act towards the parent State. If the struggle is maritime and long-continued, recognition is almost forced upon the maritime powers, but land warfare can often be ignored. The parent State grants recognition in

effect, though not in name, whenever from motives of humanity it treats its rebels, not as traitors, but as enemies. The controversy with regard to the recognition by Great Britain of the belligerency of the Confederate States in 1861 illustrates the whole question.

## D. The Immediate Effects of the Outbreak of War.

The moment war begins certain changes in the pre-existing state of things are *ipso facto* brought about. These are

(1) The public armed forces of the belligerents are placed in a condition of active hostility.

(2) There must be no commercial intercourse between private subjects of the contending States, except such as is specially authorised by the governments concerned.

This rule is of itself fatal to the doctrine, which is also abundantly disproved on other grounds, that war is a relation between States only, and not between individuals.

(3) Some Treaties with the enemy, such as Boundary Conventions, are unaffected; some, such as Treaties of Alliance, are abrogated; some, such as Extradition Treaties, are suspended; and some, such as Treaties altering the ordinary rules of Maritime Capture, are brought into active operation.

The question of the effect of war upon treaties is very complicated. Numerous cases

arise, especially with regard to great international instruments signed by many powers, as to which it is impossible to lay down beforehand rules of universal application. It is also difficult to decide when a treaty is merely suspended by war, and when it is entirely abrogated.

### Questions

1. Define War. Is a formal Declaration of War necessary before hostilities can lawfully be begun?

2. What is meant by Recognition of Belligerency? In what circumstances can it be given without offence to the parent State?

3. Discuss the doctrine that war is a relation of State to State, and not of individual to individual.

4. What is the immediate effect of the outbreak of war upon treaties between the belligerents?

### Hints as to Reading

The subjects discussed in this Chapter are dealt with by Hall in Pt. I., Ch. III., Pt. II., Ch. XI., and Pt. III., Ch. I. Oppenheim considers them in Vol. II., Pt. I., Ch. II., and Pt. II., Ch. II. Lawrence writes upon them in Pt. III., Ch. I. (4th ed.), and Wheaton in Pt. IV., Ch. I. In Halleck, Chs. XIV. and XVII. will be found useful. Holland gives valuable information about Pacific Blockade in No. VII. of his *Studies in International Law*, and Westlake about all of the forcible measures which fall short of war in Ch. I. of Pt. II. of his *International Law*.

## CHAPTER II

### THE ACQUISITION OF ENEMY CHARACTER

### A. Enemy Persons.

THE enemy character may be likened to a taint which is more or less marked according to circumstances. Certain individuals are enemies in the fullest sense. They may be slaughtered or captured, and the arms they bear may be taken as spoil of war. Others are enemies only so far as to be liable to the loss of a small portion of their property. We will endeavour to arrange the various classes of enemy persons in a descending scale, beginning with those who are enemies in the strictest sense, and ending with those who are tainted in the least degree with the enemy character.

(1) Persons found in the military or naval service of the enemy State.

These may be killed or wounded in fair fight, and, if captured, may be detained as prisoners.

(2) Seamen navigating the merchant vessels of the enemy State.

But the Hague Conference of 1907 provided that, should their vessels be taken, they are not to be held as prisoners of war if they promise in writing not to undertake while the war lasts any service connected with its operations. Should any of them be neutral subjects, they are to be freed unconditionally, except that officers must give a written promise not to serve on an enemy ship while the war lasts. Crews of merchantmen may fight to defend their vessel from capture, but not otherwise.

(3) Followers of an army, such as newspaper correspondents, contractors, etc.

Should these be captured, they can be detained or released at the discretion of the captor; but, if detained, they must be treated as prisoners of war, on proof that they hold a certificate from the military authorities of the army they were accompanying.

(4) Persons domiciled in an enemy country.

Whatever be their nationality, the property connected with their domicile is subject to the severities of war; and if they are found in an invaded district, they may be called upon to perform certain services for the invaders (Pt. III., Chs. III. and IV.), though they may not be compelled to swear allegiance to the hostile power.

(5) Persons living in a place in the military occupation of the enemy.

Even though they are subjects of the power to whom the place belongs, they are exposed to the severities of warfare, if an attempt is made to retake it.

Thus we see that nationality, service, and domicile are the great tests of enemy character. Speaking generally, a man's domicile is his permanent residence, his home.

## B. **Enemy Property.**

The enemy character belongs to property, as to persons, in a greater or less degree according to circumstances. Adopting again the plan of a descending scale, we may say that International Law regards as enemy property

(1) Property belonging to the enemy State.

This may be taken in any place where it is lawful to carry on hostilities. There are, however, certain exceptions, which will be found in Chs. IV. and V. of the present Part.

(2) Property belonging to subjects of the enemy State.

This is confiscable if found at sea under the enemy flag, unless, according to British and American practice, it is connected with a neutral domicile acquired by its owner, or with his permitted residence in the country of the capturing belligerent. On land it is

exempt from capture as a general rule. But there are many exceptions, the chief of which will be found in Ch. IV. of the present Part.

(3) Property connected with estates or places of business owned by neutrals in belligerent territory, or in places in the military occupation of the enemy.

This retains the enemy taint as long as it remains the property of the owner of the soil, or the place of business. But most Continental jurists decline to accept these propositions, and decide instead by the nationality of the owner.

(4) Property owned by neutrals, but incorporated in enemy commerce, or subject to enemy control.

For instance, a ship owned by a neutral subject, but manned by an enemy captain and crew, and habitually engaged in the enemy's trade under pass from his government, would be accounted enemy property.

Thus we see that the nationality and domicile of the owner of property, the character of the place from whence it comes, and the nature of the control exercised over it, have to be considered in determining whether it possesses the enemy character. The Courts of Great Britain and the United States are inclined to lay more stress on domicile than on nationality, whereas those of most European States attach a greater importance to nationality. The matter was fully discussed at the Naval Conference

of 1908-1909. It was agreed that the character of goods found under the enemy flag at sea should be determined by the character of their owners; but no agreement was reached on the question whether nationality or domicile determined the character of the owner.

Sometimes it is difficult to tell whether a given place is under neutral or belligerent sovereignty. In such cases the character of the property found within it, or issuing from it, must be determined by the use to which the place is put, and the character and actions of the power exercising permanent military control within it.

It must be carefully noted that enemy property cannot be captured merely because it is enemy property. Place, use, and circumstances have to be considered, as the next two Chapters will show.

## Questions

1. How may neutral subjects acquire an enemy character, and enemy subjects a neutral character?

2. What is the legal position of the merchant sailors of a belligerent in respect of actual fighting?

3. How may property acquire an enemy character?

4. Give instances showing the kind and degree of control which, when exercised by an enemy over property owned by neutral subjects, suffices to make it enemy property for purposes of belligerent capture.

## Hints as to Reading

In Hall, Pt. III., Ch. VI., will be found valuable, and in Oppenheim the last few pages of Ch. I. of Pt. II. in Vol. II. Lawrence considers the questions discussed in this chapter in Pt. III., Ch. II. (4th ed.), and in Wheaton parts of Chs. I. and II. of Pt. IV. refer to them. Halleck deals with Domicile and its consequences in Ch. XII., and on this point valuable information will be found in Westlake's *International Law*, Pt. I., Ch. X., and Vol. II., Ch. VI.

## CHAPTER III

### THE LAW OF WAR WITH REGARD TO ENEMY PERSONS

### A. Enemy Subjects found in a State at the Outbreak of War.

THE treatment of such persons has varied very much at different times. Practice with regard to them may be epitomised as follows:

(1) In the Middle Ages a right to arrest them was held to exist, but they were often allowed time to depart.

(2) In the last two centuries a number of treaties have been made, giving them a considerable time for withdrawal; and even when no treaty existed, such a period has been granted.

(3) Since the middle of the eighteenth century a practice has sprung up of allowing them to remain; and a number of treaties have stipulated for such permission, which is, of course, always subject to the condition that they give no assistance to the enemies of the State in which they reside.

We may conclude that the right to arrest has been taken away by contrary custom, and that, though the right to expel still remains, the exercise of it is looked upon with disfavour, unless a great emergency renders expulsion necessary either for the safety of the State, or to preserve the lives of those who are sent away. Severe steps were taken when the Boers, at the beginning of the war of 1899-1902, expelled British subjects from their territory, and the Russians in 1904 expelled Japanese subjects from the Viceroyalty of the Far East.

### B. **Enemy Combatants.**

By this phrase is signified the recognised fighting men of a belligerent; but it must be remembered that those persons who perform auxiliary services for an army in the field without going into action themselves are sometimes called non-combatant forces, and placed on the same legal footing as the fighting men. Setting these anomalous individuals aside, we may divide the enemy population into combatants and non-combatants. The separation of the two is one of the most conspicuous triumphs of humanity. The old idea was that war delivered over the enemy and all that he possessed to unlimited violence. The modern idea is that only so much stress may be put upon him as is sufficient to destroy his power of resistance. This principle both limits the classes to whom violence may be applied, and defines the measure and extent of the violence when applied. Hence with regard to combatants

(1) Quarter is given except in very extreme cases.

Up to the close of the Thirty Years' War in 1648 it had to be formally stipulated for by treaty. Now the Hague Regulations respecting the laws of war on land prohibit its refusal.

(2) Prisoners are well treated.

The Hague Regulations of 1907 prescribe that they are to be fed, lodged, and clothed on the same footing as the troops of their captors. Full liberty of worship is to be allowed to them. They may be released on parole. Each belligerent is to establish an Information Bureau, which is to keep an account of each individual prisoner, answer inquiries concerning him, see that gifts, correspondence, etc., reach him, and forward to his friends all valuables and objects of personal use left behind by him on death, release, or escape. Relief societies are to have every facility afforded them, and gifts for prisoners are to be admitted free of duty. The rank and file may be set to work, for which they are to receive pay on their release, the cost of their maintenance being first deducted. Besides combatants, the following may be made prisoners of war:

(*a*) Newspaper correspondents and reporters.

(*b*) Persons who are of direct benefit to the enemy's military operations, such as contractors, sutlers, and balloonists.

(*c*) Members of the enemy's royal family, and his ministers of State and great officials.

(3) The wounded and sick are properly cared for.

The provision made for them remained very meagre till quite recently. Now not only are military hospitals and ambulances, with highly skilled doctors and nurses, part of the equipment of every well-found army, but private societies and individuals are encouraged to supply additional resources under proper conditions, and neutral aid is generally welcomed. The Geneva Convention of 1864, which gave special protection to persons and things connected with the care of the sick and wounded on land, was revised and improved in 1906. At the Hague Conference of 1899, the same principles were applied to maritime warfare, and the Convention of 1907 was an improvement on that of 1899.

(4) The practice of refusing quarter to the defenders of a fortress taken by assault is obsolete.

It died hard; but is now forbidden, and recent wars between civilised powers have afforded no instance of it.

(5) Certain means of destruction are prohibited.

They are regarded either as treacherous or as unnecessarily cruel. In Ch. VI. of this Part an enumeration of them will be found.

### C. **Enemy Non-Combatants.**

The old custom was to inflict every indignity from robbery to death upon the unarmed inhabitants of an enemy's country. Gradually and slowly more humane practices won recognition, till at the present time

(1) Non-combatants are exempt from personal injury knowingly and wantonly inflicted, and from pillage, provided that they submit to the lawful demands of the enemy and observe the regulations laid down by him. But when individuals act at one time as harmless civilians and at another as fighting men, interchanging the parts as occasion requires, they may be put to death, if caught.

The peaceful inhabitants of territory under the enemy's occupation (see Pt. III., Ch. IV.) are liable to be called upon to perform for him any service that is not distinctly military in its character; but they may not be compelled to take part in operations of war directed against their own country. Contributions and requisitions may be levied on them in certain circumstances; and they must not, under pain of death, give assistance or information to their own side. A custom of allowing women and children to leave places about to be bombarded is springing up, though it has not yet obtained binding force.

(2) The inhabitants of captured towns are held to be entitled to protection.

They should not be abandoned to the violence of the victorious soldiery.

(3) Those who tend the sick and wounded are exempted from armed violence by the Geneva and Hague Conventions.

This protection is given to them on condition that they take no part in acts of hostility, and wear on the left arm the badge of a red cross on a white ground.

The resolutions of the Brussels Conference of 1874 were the basis of the discussions upon the laws of war at the Hague Conference of 1899, and the Hague Regulations of 1899 were revised and extended at the Conference of 1907. Most of the powers represented at the Conference have since ratified the Convention, which is therefore binding upon them in their wars with one another. Unfortunately in dealing with barbarous foes resort is often had to practices far more cruel than those which are used in civilised warfare. There is grave danger lest this chartered inhumanity should seriously deteriorate the character of the forces which are guilty of it, and the nations which tolerate it.

### Questions

1. Give a brief sketch of the treatment to which enemy subjects found in a State at the outbreak of war have been subjected at various times.

2. Trace the gradual growth of humane usages with regard to combatants in war.

3. On what conditions are non-combatants exempt from personal molestation by a victorious enemy?

4. State what you know of the Geneva Convention, and the extension of its principles to maritime warfare at the Hague Conferences.

## Hints as to Reading

In Hall, Pt. III., Chs. II. and IV., should be read, in Oppenheim, parts of Chs. III. and IV. of Pt. II. of Vol. II., and in Wheaton those portions of Pt. IV., Chs. I. and II., which bear upon the subjects we have been considering. Lectures VII.-IX. of Maine's *International Law*, and Pt. III., Ch. III., of Lawrence (4th ed.), will be found useful. Westlake deals with our present subject in his *International Law*, Pt. II., Chs. IV. and XI., and discusses some modern Continental theories in Ch. XI. of his *Chapters on the Principles of International Law*. Ch. XX. of Halleck may be referred to with advantage. In *The Laws of War on Land*, by T. E. Holland, and *The Hague Peace Conferences*, by A. Pearce Higgins, will be found the regulations respecting land warfare drawn up at the Hague. The latter author gives in addition the other results of the Conferences, and the various Conventions and Agreements which prepared the way for them.

## CHAPTER IV

### THE LAW OF WAR WITH REGARD TO ENEMY PROPERTY ON LAND

### A. Enemy Property found within a State's Land Territory at the Outbreak of War.

THIS may be divided into property of the enemy State and property of private individuals. In the rare cases in which any of the former is found in the territory of an enemy at the commencement of a war it will be confiscated, unless perhaps it happens to consist of books or works of art. Private property must be considered under the heads of

(1) Real Property.

The earliest practice was to confiscate it. The next step was to appropriate the revenues only. In modern times there has been but one instance of confiscation.

(2) Ordinary Personal Property.

This was confiscated till quite modern times, and the Boers in 1899 and 1900 levied fines upon British subjects who would not fight against their own country, and confiscated gold. But many States have entered into treaties

forbidding confiscation, and there is so strong a preponderance of modern practice against it that we may doubt whether the right to confiscate still survives. Debts due from subjects of one belligerent to subjects of the other are on the same footing as other forms of personal property. The attempt made by Great Britain in 1807 to support, as against Denmark, the doctrine that they alone were unconfiscable met with little favour. But they have not been confiscated in recent wars. They cannot be collected during the war; yet the right to demand them revives as soon as peace is concluded. This was the British rule; and our Courts would require legislation before they changed it. But there is doubt as to how far it still stands internationally, since Art. 23 (*h*) of the Hague Regulations of 1907 forbids a belligerent "to declare abolished, suspended, or inadmissible in a court of law the rights and actions of the nationals of the hostile party."

(3) Debts due from a belligerent State to subjects of the enemy.

It is held that the national faith is pledged to them in so sacred a manner that they cannot be confiscated in time of war. This was fully established by the Silesian Loan controversy of 1752-1756.

B. **Booty.**

Movables taken from the enemy as spoil in the course of warlike operations on land are called

Booty. But the Hague Code for land warfare greatly restricts the scope of this definition by providing that the personal trinkets and belongings of prisoners shall remain their property, and that such things, when found on battlefields, shall be sent to the relatives of their dead owners. International Law gives spoil of war to the captors' State; but the laws of all civilised countries provide that the whole or a part of the captured goods shall be made over to the captors. Generally booty is sold, and the proceeds divided among all concerned in the capture according to a plan drawn up by the authorities of the captors' State. If it is recaptured before it has been for twenty-four hours in the possession of the captors, or before they have brought it within their lines, it reverts to the original owners, and does not belong to the recaptors.

### C. Belligerent Occupation and the Rights over Property gained thereby.

Till comparatively modern times no distinction was drawn between Occupation and completed Conquest, and the customs of warfare with regard to the appropriation and destruction of property by an invader were most severe. But from the beginning of the eighteenth century we may date the commencement of a decided improvement. In modern times the rights of an occupying invader have been sharply distinguished from the full rights of

sovereignty gained by Conquest in the legal sense. But inasmuch as the former are still great, an invader is apt to regard a district as occupied on very slight grounds. The Hague Conferences of 1899 and 1907 attempted to reduce the claims of an invading army to reasonable proportions by explaining the nature of Occupation in the following words:

*Territory is considered to be occupied when it is actually placed under the authority of the hostile army. The occupation applies only to territories where such authority is established, and in a position to assert itself.*

Thus, in order that an invader may lawfully, exercise the rights of belligerent occupation in any district, he must have it in his firm possession. It is not enough that his scouts and advanced parties have penetrated into it without establishing authority over it. Occupation has most important legal consequences with regard to property. We will deal with it under the heads of

(1) State Property.

Movables belonging to the invaded State may be appropriated and alienated, with certain exceptions, such as legal documents, libraries, archives not concerned with the causes and conduct of the war, and works of art. But immovables may not be alienated, though they may, as a rule, be used, and the rents and profits arising from them may be appropriated.

(2) Private Property.

It may be dealt with as follows:

(*a*) Immovables may be used or destroyed only so far as the necessities of war compel, and the profits arising from them may not be confiscated.

(*b*) Movables may not be seized unless they are of immediate use in war; but the Hague Regulations of 1907 added that they must be restored and compensation paid when peace is made. Confiscation or destruction is allowed as a punishment for illegal acts done by the owners.

(*c*) Requisitions may be made, and contributions and fines levied, by the authorities of the occupying army, who may also collect the taxes, in which case the first charge on them must be the expenses of administration in the occupied territory. *Requisitions* are demands for articles needed for the daily use and consumption of the invaders; *Contributions* are sums of money exacted over and above the ordinary taxes, and ought not to be levied except to supply the wants of the army and the administration; and *Fines* are sums of money levied upon districts as punishments for offences against the invaders committed within them. These last seem to be forbidden by Art. 50 of the Hague Regulations of 1907, except in cases when they can be brought

under the head of Reprisals. Payment should be made for what is taken by way of requisition. If not, receipts should be given for them, and the receipts should be honoured as soon as possible.

With regard to all these matters the Hague Conferences of 1899 and 1907 laid down important rules, many of which are summarised in the text of this Chapter.

### Questions

1. How may property acquire an enemy character?
2. What are the rules of International Law with regard to private enemy property found within a State at the outbreak of war?
3. Distinguish Booty from Conquests, Prizes, Requisitions, and Contributions.
4. Define an occupied district. What rights over property are gained by Occupation?

### Hints as to Reading

Hall discusses the subjects noticed in this Chapter in Pt. III., Chs. III., IV., and VI., Westlake in Pt. II., Ch. IV., and Oppenheim in Vol. II., Pt. II., Ch. III. In Wheaton, Pt. IV., Ch. II. should be looked through again. Pt. III., Ch. IV. of Lawrence (4th ed.), and Lectures X. and XI. of Maine should be carefully studied. Chs. XXI., XXXIII., and XXXIV. of Halleck may be read with advantage. The Hague Regulations should be studied in either Holland or Higgins.

## CHAPTER V

### THE LAW OF WAR WITH REGARD TO ENEMY PROPERTY AT SEA

### A. Belligerent Rights of Capture.

At sea private as well as public property belonging to the enemy is liable to capture. The ships of a belligerent may be attacked and taken in their own ports and waters, in the ports and waters of the attacking power, and on the high seas, but not in neutral ports and waters. We may consider the various cases under the following heads:

(1) Public and private vessels of the enemy. These may be captured unless they are
   (*a*) Hospital ships employed according to the provisions of the Hague Conventions of 1899 and 1907, or vessels charged with religious, scientific, or philanthropic missions.
   (*b*) Cartel ships, which are either public or private vessels engaged exclusively in services connected with the exchange of prisoners.

(*c*) Merchantmen found in the ports of their foe at the outbreak of hostilities. The Hague Conference declared it "desirable" that such vessels should be allowed to depart "either immediately or after a reasonable number of days of grace," and suggested the application of the same rule to those who left their last port of departure before the outbreak of war and entered an enemy port in ignorance of it. But ships in either predicament are not in any case to be confiscated. If days of grace are not granted to them, they must be detained till the end of the war without compensation, or requisitioned on payment of compensation. Moreover, enemy merchantmen who left their last port of departure before the commencement of the war and are seized on the high seas while still ignorant of it, are liable, not to confiscation, but to be detained without compensation while the war lasts, or requisitioned, or even destroyed, on payment of compensation. But the old right of confiscation still applies to "merchantmen whose build shows that they are intended for conversion into warships."

(*d*) Fishing boats engaged in coast fisheries, and small craft employed in local trade. But the immunity does not extend to deep-sea fishing boats, and may be with-

drawn from in-shore boats if they are used for hostile purposes.

(*e*) Mail-boats, but only if exempted by treaty or by special favour of the belligerent government.

(2) Goods of the enemy found on board enemy vessels.

These may be captured with the exception of mail-bags, which were exempted by the Hague Conference of 1907, and enemy cargo found on board the ships dealt with under head (*c*) above. The latter may either be "detained and restored after the termination of the war without payment of compensation, or requisitioned on payment of compensation." Medical stores and comforts, though they may be captured, must be used for the sick and wounded as long as the need exists.

(3) Contraband goods found on board neutral vessels.

These may be captured; but the second article of the Declaration of Paris of 1856 provides that the neutral flag shall protect non-contraband goods of the enemy.

The ransom of ships and goods captured by the enemy is recognised by International Law; but Great Britain and many other States forbid their subjects to resort to it. Property captured by the enemy at sea, and then recaptured, is restored to the original owners under conditions laid down by

the law of each State for its own naval forces. Great Britain restores if the recapture takes place during the same war, on payment to the recaptors of a salvage of from one-eighth to one-fourth of the value of the recaptured property.

### B. **The Right of Search.**

This is the right to stop and visit and overhaul vessels on the High Seas, in order to discover whether they or the goods they carry are liable to capture. It is ancillary to the rights of capture, which would be useless without it. It should be noted that

(1) The Right of Search is a strictly belligerent right, and, except as regards pirates, does not exist in time of peace, unless expressly granted by treaty for some special purpose.

(2) At the Naval Conference of 1908-1909 Great Britain withdrew her opposition to the doctrine that the presence with neutral merchantmen of a public vessel of their own State as escort and protector exempts them from belligerent search. It must therefore be regarded as good International Law. But if neutral merchantmen accept the protection of a belligerent ship of war they render themselves *ipso facto* liable to capture by the other belligerent.

Most civilised States have conceded to one another a limited Right of Search in time of peace

for the purpose of putting down the African Slave Trade (Pt. II., Ch. III.). The full exercise of the Right of Search against neutral vessels in time of war is felt to be exceedingly burdensome owing to modern conditions of commerce, and modifications of it are eagerly desired, though none have yet met with general approval.

### C. **Prize Courts.**

For the protection of neutrals, and the proper adjustment of the claims of captors, all civilised States establish Prize Courts in their territories to decide questions of proprietary right in captures made by their cruisers. We may lay down with regard to them that

(1) Though they are Municipal Tribunals, they purport to administer International Law.
(2) Their jurisdiction covers not only captures made by cruisers of their own country when it is at war, but also certain exceptional captures, made when it is at peace, by belligerent vessels which have violated its neutrality.
(3) They may sit in territory belonging to the captor, or in territory of his ally in the war, but not in neutral territory.
(4) Their procedure takes the form rather of an inquiry by the Government than of an ordinary trial between litigants.
(5) The State is responsible for their acts; and

if they give unjust decisions, it is bound to grant satisfaction to the parties aggrieved, especially when they are neutral subjects.

When a capture is made at sea, it is the duty of the capturing cruiser to send the captured vessel, with its crew, its papers, and all things on board it, to the nearest Prize Court of the captor's country for adjudication. But if it is impossible or exceedingly dangerous to navigate the vessel to a port where a Prize Court is sitting, she may be destroyed at sea if an enemy, but should be released if a neutral. The Declaration of London of 1909 authorises a departure from this rule in cases of extreme necessity, such as "danger to the safety of the warship or to the success of the operations in which she is engaged at the time." Unless such necessity is established before a Prize Court, compensation must be given to the parties interested. If it is established, and yet the Court holds that the original capture was illegal, compensation must be paid. If neutral goods not liable to confiscation have been destroyed with the vessel, their owners are entitled to compensation.

The Hague Conference of 1907 provided for the establishment of an International Prize Court before which neutrals could take on appeal cases which had been decided in the first instance by belligerent Prize Courts. If the Court comes into existence in consequence of the work of the Naval Conference of 1908-1909 in providing rules for its guidance, a very great step forward will have been taken in

the sound administration and wise development of International Law.

## Questions

1. In what circumstances may enemy goods be captured on the High Seas?
2. Give the British rules as to ransom and recapture of vessels taken by the enemy.
3. Explain the nature and extent of the Right of Search.
4. What are Prize Courts? Discuss the questions connected with the destruction of prizes at sea.

## Hints as to Reading

In Hall's Pt. III., the greater part of Ch. III. and the last section of Ch. V. should be read, and also Ch. X. of Pt. IV. In Wheaton, Chs. I. and II. of Pt. IV. will still repay perusal. Lawrence deals fully with our present subject in Pt. III., Ch. V. (4th Ed.), as does Halleck in Chs. XXII., XXVII., XXXI., XXXII., and XXXV., Westlake in Pt. II., Chs. VI. and XI., and Oppenheim in Vol. II., Pt. II., Ch. IV. The Hague Conventions concerned with the subject matter of the chapter should be studied in Higgins.

## CHAPTER VI

### THE AGENTS, INSTRUMENTS, AND METHODS OF WARFARE

### A. Agents.

THE soldiers and sailors of the regular army and navy of the belligerents, including fully organised militia and reserves, are of course lawful agents of warfare. But doubts and disputes have arisen as to the employment of certain kinds of persons. Some of the most difficult and controverted points of modern International Law arise with regard to them. We will consider them under the heads of

(1) Guerilla Troops.

They are lawful combatants if they wear a distinctive badge recognisable at a distance, carry arms openly, observe the ordinary rules of war, and act under the orders of a person responsible for his subordinates.

(2) Levies *en masse*.

When the inhabitants of districts not occupied by an enemy rise in obedience to the orders of their government, they are lawful combatants, if they respect the laws and customs of war. With regard to spontaneous risings

on the approach of an invader, there was more difficulty; but it was settled by the Hague Conference of 1907 that they are legal, if the populations who rise carry arms openly, and respect the laws of war. But an insurrection of the inhabitants of occupied districts against an invader will not be regarded by him as a lawful act of war. For the sake of the safety of his own troops he must repress it with severity, however greatly he may respect the patriotic fervour which prompts it.

(3) Savage Troops.

The practice of employing them as allies and auxiliaries is too common to be called illegal. But in the Boer war of 1899-1902 both sides refrained from using the natives in actual combat. If partially civilised men are regularly embodied and drilled, and led by civilised officers, they can undoubtedly be used; and it is the unfortunate custom in warfare with barbarous tribes to accept the aid of other barbarians organised and led in their own fashion.

(4) Spies.

They may be used by commanders, but if they are caught in the act by the other side the penalty is death, but it must be inflicted by order of a Court after a trial.

## B. Instruments and Methods.

We may discuss these under the following heads, bearing in mind that all instruments and methods

of destruction not forbidden by International Law are allowed. It will not be necessary, therefore, to deal with any but the prohibited and doubtful cases.

(1) Privateers.

These were vessels owned and manned by private persons, but authorised by the State on certain conditions to depredate on the commerce of the enemy. They are forbidden by the Declaration of Paris of 1856, which has been signed by nearly all civilised States and observed even by those who have not signed it.

(2) A Volunteer Navy.

Its legality depends upon the closeness of the control exercised over its ships and crews by the authorities of the State which employs them.

(3) Converted Cruisers.

Both at the Hague Conference of 1907 and at the Naval Conference of 1908-1909 the Powers failed to reach an agreement as to the legality of the conversion of a belligerent merchantman into a belligerent warship on the high seas. With this was bound up the question of the legality of reconversion. Great Britain takes the view that conversion is illegal except in a port of the belligerent country, and possibly in the port of an ally in the war. She is strongly backed by the United States and Japan, while Russia

and Germany are the leaders on the other side. Unless the question can be settled by negotiation, it will cause a vast amount of ill-blood between belligerents, and much friction between belligerents and neutrals, in future naval wars.

(4) Submarine Mines.

The Hague Conference of 1907 prohibited anchored contact mines unless they were so constructed as to become harmless as soon as they broke loose from their moorings, and drifting contact mines unless they lost their explosive power one hour at most after they ceased to be under the control of the persons who laid them. But the freedom of laying mines anywhere except in neutral waters was in no way restricted; and the prohibitions recited above were rendered valueless for the present by the proviso that States which did not possess mines of the prescribed kinds must convert them, not at once, but "as soon as possible." The Convention on submarine mines is most unsatisfactory. It leaves neutral shipping and innocent travellers exposed to terrible and secret dangers in the event of a great maritime struggle.

(5) Bombardments.

The Hague Regulations for land warfare forbid the bombardment "by whatever means" of undefended places, thus including the dropping of projectiles from balloons, as well as the use of artillery. As to sea warfare the

Hague Conference of 1907 produced a Convention which prohibited the bombardment of undefended "ports, towns, villages, dwellings, or buildings." But warships in the harbour, stores, works, or plant "which could be utilised for the needs of the hostile fleet or army" may be cannonaded, if the local authorities do not destroy them on demand, and if all other means of destruction are impossible. Moreover, bombardment may be resorted to in order to compel the payment of requisitions "necessary for the immediate use of the naval force before the place," but not in order to exact contributions in money. When bombardments take place on land or from the sea, buildings dedicated to the relief of the sick and wounded, or the uses of religion, art, or science, and historical monuments are to be spared as far as possible. They must not be used for warlike purposes, and should be indicated by certain conspicuous signs.

(6) Projectiles.

The employment of "arms, projectiles, or material calculated to cause superfluous injury" is forbidden by the Hague Regulations for warfare on land. Explosive bullets weighing less than 14 oz. are particularly forbidden by the Declaration of St. Petersburg of 1868. By a Declaration made at the Hague Conference of 1907, destined to hold good till the close of the next Hague Conference, a large number of Powers, including Great Britain,

have bound themselves, in case of war between two or more of them, to refrain from "the discharge of projectiles and explosives from balloons or by other new methods of a similar nature." A Declaration against the use of "projectiles the only object of which is the diffusion of asphyxiating or deleterious gases," and another against the use of "bullets which expand or flatten easily in the human body," were made at the first Hague Conference, and were acceded to by Great Britain at the second.

(7) Devastation.

The devastation of territory is lawful when immediate and overwhelming military necessity can be pleaded as a justification of it. Otherwise it is regarded as barbarous and illegal. But the devastation by a population of their own country in order to check the advance of an invader is an act of heroic self-sacrifice, which the laws of war in no way forbid.

(8) Stratagems.

Those which violate the general understanding between belligerents are not allowable; but all other ruses may lawfully be resorted to. Accordingly the treacherous use of flags of truce, the Geneva flags and badges, or any other signs which have a definite meaning in war, is strictly forbidden.

(9) Assassination.

Treachery is the characteristic which distinguishes assassination from the slaughter

allowed in warfare. A treacherous attack is forbidden; killing in a surprise is lawful.

(10) Poison.

The poisoning of food and water likely to be used by the enemy is unlawful, as is also the use of poisoned weapons.

## Questions

1. In what circumstances can bodies of men not enrolled in the regular army of a belligerent State claim to be regarded as lawful combatants?

2. What are converted cruisers? Discuss the circumstances in which their conversion should be regarded as legal.

3. Give and criticise the laws of war with regard to submarine mines.

4. Distinguish between the lawful and the unlawful use of devastation in war.

## Hints as to Reading

Pt. III., Ch. VII., of Hall, and portions of Chs. I. and III. in Pt. II., Vol. II., of Oppenheim, will be found useful. In Wheaton, portions of Ch. II. of Pt. IV. bear on the subjects of this Chapter. Pt. III., Ch. VI., of Lawrence (4th ed.) goes over the same ground, as also does Ch. XVIII. of Halleck. Maine covers most of it in Lectures VI.-VIII., and Westlake discusses some important questions connected with it in Ch. XI. of his *Chapters on the Principles of International Law*, and in Chs. VI. and XI. of Pt. II. of his *International Law*.

## CHAPTER VII

### THE NON-HOSTILE INTERCOURSE OF BELLIGERENTS, AND PEACE

### A. **The Non-hostile Intercourse of Belligerents.**

DURING war a certain amount of more or less amicable intercourse takes place between the belligerents. This may be considered under the heads of

(1) Flags of Truce.

These are white flags used as signals when one belligerent wishes to send a message to the other in the field. The bearers of them may not be fired upon, injured, or taken prisoners, as long as they carry out their mission in good faith; but a belligerent may refuse to receive them at all, or may receive them only on conditions.

(2) Passports and Safe-conducts.

These are permissions to travel given by a belligerent government to subjects of the enemy. Passports refer to persons, safe-conducts to persons and things.

(3) Licences to trade.

These are *general* when a State grants

permission to all its own subjects, or all enemy subjects, to trade in particular articles or at particular places; *special* when permission is granted by the State or one of its commanders to particular individuals to trade in the manner described in the licence. Neutrals, too, may receive licences to engage in a trade closed to them by the ordinary laws of war.

(4) Cartels.

These are agreements between belligerents as to the mode of conducting such intercourse as they allow in war time. The term is applied especially to agreements with regard to the exchange of prisoners.

(5) Capitulations.

These are agreements for the surrender upon conditions of a fortified place, or a military or naval force. Every commander may make them with regard to the places or forces under his control; but if he exceeds his powers the agreement must be accepted by his commander-in-chief before it is valid, and if political conditions are stipulated for by naval or military authorities, the capitulation is void unless ratified by their governments.

(6) Truces and Armistices.

These are temporary suspensions of hostilities over the whole or a portion of the field of warfare. Any commander may make them in order to meet the temporary needs of his own forces; but a general armistice covering the whole field of warfare can be made only

by the supreme power in the State. Such an armistice is generally concluded as the first step towards entering on negotiations for peace.

There are other *commercia belli*, but they are hardly important enough to be classified.

## B. The Legal Effects of the Conclusion of Peace.

War between civilised States is almost invariably terminated by a Treaty of Peace. It is to be noted that

(1) As soon as peace is made all rights incident to a state of war cease, unless the treaty itself fixes a future date for the termination of hostilities. Not only must there be no more fighting, but requisitions and contributions can no longer be levied, nor prisoners of war detained as such.

(2) At the conclusion of peace all private rights suspended during the war are revived. Contracts not invalidated or rendered impossible of fulfilment by the war can be enforced, and private debts sued for.

(3) As between the States lately belligerent the principle of *uti possidetis* holds good where there are no express stipulations in the treaty of peace. But treaties provide almost as a matter of course for the settlement of all important questions.

Completed Conquest has all the legal effects of Cession by Treaty. But transfer of territory by mere Conquest is very rare in modern times, the most recent instance being the annexation of the Orange Free State and the Transvaal by Great Britain in 1900. Territory is almost always made over by treaty, a course which has legally the great advantage of fixing the exact date when the new sovereignty and the new order of things based on it commence.

### C. The Hague Conferences and Peace.

The powers represented at the Hague Conference of 1899 agreed upon a Convention, revised and improved in 1907, which began by strongly recommending States unconcerned in a dispute to use their good offices for its solution, and suggesting one or two novel methods of reaching a peaceful conclusion. It went on to create a Permanent Arbitral Court composed of four members nominated by each of the signatory powers. From the list thus created the Arbitrators in any given case were to be chosen by the governments at issue, if they decided upon arbitration. Already several disputes between States have been settled by the use of the machinery thus provided, and arrangements have been made to settle others in the same way. The attempt of the second Hague Conference to set up a Court of Arbitral Justice, to be the Supreme Court of the Society of Nations, failed, because no scheme could be agreed on for the distribution of the Judges among the signatory

powers. A like failure attended the effort to bind the powers always to send certain classes of cases to arbitration. But the germs of future success are contained in both the failures. Since 1907 separate powers or groups of powers have negotiated among themselves numerous treaties for what is called compulsory arbitration.

## Questions

1. Give the rules of International Law with regard to flags of truce.

2. Describe the nature of cartels. What are cartel ships, and under what regulations do they sail?

3. What is an armistice? Who have authority to make such agreements? What conditions are implied when one is concluded?

4. Enumerate the chief facilities for avoiding war provided by the Hague Conferences of 1899 and 1907.

## Hints as to Reading

Hall discusses the subjects of this Chapter in Chs. VIII. and IX. of Pt. III. Wheaton deals with them in a few pages of Ch. II., and the whole of Ch. IV., of Pt. IV. They are set forth in Lawrence, Pt. III., Chs. VII. and VIII. (4th ed.), and in Oppenheim, Vol. II., Pt. II., Chs. V. and VII. In Halleck, Chs. XXIX., XXX., and XXXIV. should be referred to, and in Maine, Lecture X. In Higgins the Hague Convention for the Pacific Settlement of International Disputes should be studied carefully.

# PART IV.

# THE LAW OF NEUTRALITY

## CHAPTER I

### THE NATURE OF NEUTRALITY, AND THE DIVISIONS OF THE LAW OF NEUTRALITY

### A. The Nature of Neutrality.

NEUTRALITY may be defined as *The condition of those States which in time of war take no part in the contest, but continue pacific intercourse with the belligerents.* On their part, therefore, it is a continuation of the previously existing state of peace; but nevertheless there are affixed to it by International Law certain rights and obligations which do not exist in a time of universal peace, and these are set forth and defined in the Law of Neutrality. We may discuss the nature of neutrality under the following heads:

(1) The Kinds into which it has been divided.

The old division into perfect neutrality and imperfect or qualified neutrality is no longer applicable. International Law now requires from all neutrals, whatever their sympathies, even-handed impartiality as between the belligerents, and complete abstention from acts or

forbearances which may have a direct influence on warlike operations. The benevolent neutrality so frequently heard of in modern discussions is a departure from true neutrality, if it means allowing to one side privileges which are denied to the other.

(2) The Difference between Neutrality and Neutralisation.

In ordinary neutrality are involved the two elements of abstention from taking part in an existing war, and freedom to engage in it or not to engage in it at pleasure. In neutralisation the first element remains the same; but instead of the second there is imposed by International Law either an obligation not to fight except in the strictest self-defence, or an obligation to abstain from warlike use of certain places and things which have had the neutral character stamped upon them by convention. This condition of enforced neutrality may be imposed on

(*a*) States, such as Belgium and Switzerland, whose independence and perpetual neutrality are guaranteed by the Great Powers of Europe.

(*b*) Provinces, such as Savoy and the Ionian Islands of Corfu and Paxo, which have been neutralised by the Great Powers, but whose position, as portions of States which are free to make war

when they think fit, is certainly anomalous.

(*c*) International Waterways, such as the Suez Canal, which was neutralised by the Convention of October 1888.

As neutralisation alters the rights and obligations of all the States affected by it, either their express consent, or the agreement of the Great Powers acting as in some sort their representatives, is necessary in order to give it validity. The word is often used in a loose and inaccurate manner to cover undertakings in abatement or mitigation of war, entered into by one or two States. We must, therefore, remember that there can be no true neutralisation without the complete and permanent imposition of the neutral character by general consent. Thus Argentina and Chile could not impose an obligation on the rest of the world to refrain from warfare in the Straits of Magellan by declaring them neutralised, as they did by treaty between themselves in 1881. But an agreement between the States most directly interested may in practice amount to much the same thing, if they are powerful and determined, and covenant for the application of rules which have already received general consent in a similar case. The Treaty of 1901 between Great Britain and the United States for applying to the Panama Canal, when made, the rules of navigation now applied to the Suez Canal, is an illustration.

## B. The Divisions of the Law of Neutrality.

Neither Greeks nor Romans had names exactly corresponding to our terms *neutral* and *neutrality*. Indeed, these terms did not come into general use till about the middle of the eighteenth century,—a sure proof that no great body of law had grown up with regard to the things signified by them. In the Middle Ages it was common for States who were ostensibly at peace to commit flagrant acts of hostility, and for belligerents to violate neutral territory with scant ceremony. The old distinction between principals and accessories in a war lent itself to loose practice. So rudimentary was the law on the subject that even Grotius has but one chapter on neutrality. But from his time a number of rules concerning it rapidly grew up, till now they form one of the largest and most important portions of International Law. The Law of Neutrality falls naturally into two divisions, which we will deal with under the heads of

(1) Rights and Obligations as between Belligerent States and Neutral States.

With regard to these we may mark the following stages in the growth of opinion:

(*a*) As soon as it was recognised that belligerent and neutral States had duties to one another, it was held that the neutral must measure its duty to the belligerent by its view of the justice of the quarrel, and that the belligerent

must allow the neutral to abstain from war, and must not violate its sovereignty on trivial pretexts. This was the view of Grotius, and it may be roughly described as the accepted doctrine of the seventeenth century.

(*b*) The next stage is reached when it is generally considered wrong for a neutral to give assistance to a belligerent unless bound to do so by treaty made before the war, and for a belligerent to violate neutral sovereignty without grave necessity. This may be roughly described as the accepted doctrine of the eighteenth century.

(*c*) Finally, we get the view that the neutral must refrain, without regard to its sympathies or views of the justice of the quarrel, from giving aid to a belligerent under any circumstances, and that it must also restrain its subjects from certain acts calculated to assist one belligerent to the detriment of the other, while belligerents, on their part, must scrupulously respect neutral sovereignty. This may be roughly described as the accepted doctrine of the nineteenth century.

This part of the Law of Neutrality is in the main due to the development of the ethical principles that the neutral is bound to show

perfect impartiality, and the belligerent to respect neutral sovereignty. The process of growth still continues; and, though at the present time the rights of neutral States are tolerably well defined, there is great doubt as to the full measure of their obligations, which it has been the tendency of modern times to enlarge.

(2) Rights and Obligations as between Belligerent States and Neutral Individuals.

From the infancy of maritime law belligerents have had the right of putting a certain amount of restraint upon the trade of neutral merchants. If a neutral individual engages in a forbidden trade, the belligerent State does not complain to the neutral State, but it strikes at the neutral individual directly, and punishes him in its own Prize Courts. The neutral State does not appear in the matter at all, unless the punishment is not warranted by International Law, or is greatly in excess of what is warranted, in which cases it claims reparation for its injured subject. Moreover it will have a right of appeal to the International Prize Court in cases where its own interests or those of its subjects are concerned, if such a Court is set up under the provisions of the Hague Convention of 1907 for that purpose. We may consider this portion of the Law of Neutrality under the heads of

(*a*) Ordinary Commerce.
(*b*) Blockade.
(*c*) Contraband Trade.
(*d*) Unneutral Service.

The law on these subjects arises from the conflict of the two principles that neutrals have a right to continue their peaceful pursuits undisturbed by belligerents, and that belligerents have a right to continue their warlike operations undisturbed by neutrals. It is made up of rules settling which of them shall prevail in given cases, or what compromise shall be made between them. In these matters the tendency of modern times is to enlarge the rights of neutrals.

## Questions

1. Define Neutrality. Into what kinds has it been divided? Examine the propriety of the division.

2. Explain the exact position in International Law of a Permanently Neutralised State. Give a list of such States.

3. Show by a short historical review that the obligations of neutral States have grown enormously within the last century, while they have also enjoyed a corresponding growth of rights.

4. Give divisions of the Law of Neutrality, and point out the principles on which they are made.

## Hints as to Reading

Hall's treatment of Neutrality is exceedingly full and able. Ch. IV. of Pt. I. should be read as a preliminary exercise. Ch. II. of Pt. IV. deals with the subjects discussed in this Chapter, as do also Pt. II., Ch. VII. of Westlake, Pt. IV., Ch. I. of Lawrence (4th ed.), and Vol. II., Pt. III., Ch. I. of Oppenheim. Some of them are considered in the earlier sections of Ch. III., Pt. IV. of Wheaton. Ch. III., Sec. VI. of *Political and Legal Remedies for War*, by Sheldon Amos, gives instances of treaty provisions directed towards conferring the neutral character.

## CHAPTER II

### RIGHTS AND OBLIGATIONS AS BETWEEN BELLIGERENT STATES AND NEUTRAL STATES

### A. The Obligations of a Belligerent State towards Neutral States.

INTERNATIONAL Law defines with considerable clearness the obligations of a belligerent State in its relations with neutral States. The following are the chief of them:

(1) Not to carry on hostilities within neutral territory.

(2) Not to make on neutral land or in neutral waters direct preparations for acts of hostility, such as fitting out warlike expeditions, recruiting men, obtaining supplies of arms and warlike stores, or using such territory as a base of operations.

(3) To obey all reasonable and impartial regulations made by neutrals in such matters as the disarming and interning of its troops driven across neutral frontiers, the obtaining of information in neutral ports, the admission

of its cruisers and their prizes into neutral harbours, the length of time they may stay, and the amount of innocent supplies, such as coals and provisions, they may take in.

(4) To make reparation to any State whose neutrality it may have violated.

Belligerents have no right to seize, under the name of Angary or Prestation, neutral merchant vessels found within the waters controlled by them, for the purpose of using such vessels as transports, or in furtherance of warlike operations in any way. Extreme necessity may excuse such a proceeding, but even then apology and satisfaction are due.

### B. The Obligations of a Neutral State towards Belligerent States.

The portion of International Law which deals with the obligations of neutral States in their relations with belligerent States is in an unsettled condition. Some of its rules are clear and definite. With regard to others there is much doubt. We may say that a neutral State is bound

(1) To abstain in its dealings with either belligerent from such acts as giving armed assistance, or giving or lending money, or giving or selling instruments or munitions of war; but it is under no obligation to prevent its subjects from lending money to a belligerent, or selling and conveying to it what is known as contraband of war (see Pt. IV.,

Ch. v.). It must abstain from granting to one side, in matters connected with hostilities, privileges which it denies to the other, and even from performing services of humanity in such a way as to assist the warlike operations of either party.

(2) To prevent such acts as the use of any parts of its territory for military or naval operations on the part of the belligerents, the recruitment in them of soldiers and sailors, or the fitting out therein and original departure therefrom of warlike expeditions. Belligerent vessels may pay short visits to neutral harbours, but they must not be allowed to receive in neutral waters supplies and equipments directly useful for warlike purposes, or such repairs as add to their fighting power, nor may they be permitted to use the waters of a neutral as a base of operations. Their internal economy must not be interfered with by the local authorities; but if any prisoners they may be carrying escape to the shore, the port officials must neither surrender them nor permit them to be recaptured. The land forces of belligerents must be prevented from marching through neutral territory.

(3) To acquiesce in the visit and search of its merchantmen by lawfully commissioned belligerent men-of-war, their capture when circumstances are suspicious, and their confiscation, with possibly that of their cargoes also, when proceedings which International

Law visits with such penalties have been proved against them in a Prize Court of the captor's State. But if the International Prize Court contemplated by the Hague Conference of 1907 comes into being, it will have a right of appeal thereto. Neutral governments must also acquiesce in incidental damage sustained by them or their subjects in the course of the lawful operations of warfare.

(4) To recapture, if possible, and then restore, prizes that have been taken by warlike force exercised within its waters. If it allows belligerents to bring their prizes into its ports, it must restore any taken outside its jurisdiction by a vessel fitted out in violation of its neutrality, should they be brought within such jurisdiction during the voyage in connection with which the breach of neutrality occurred.

(5) To make reparation to any belligerent which has been seriously injured by failure on its part to use reasonable care and diligence in the performance of the duties imposed on it. But it is not responsible if proper precautions are taken and fail.

### C. Matters as to which Neutral States were free within Limits to act at their Discretion.

There were a large number of matters with regard to which International Law imposed no obligation on neutral governments to act in a

certain definite way, but left them free to exercise their discretion provided that the regulations they made were consistent with the principles of neutrality, reasonable in themselves, and applied impartially to both sides. The result was variety, confusion, and recrimination. The Hague Conference of 1907 endeavoured with limited success to substitute rules arrived at by general consent for a multitude of divergent practices. The most important of the matters referred to are

(1) The stay of belligerent warships in neutral waters.

Neutral states may forbid the entry of belligerent warships altogether, as did Sweden and Norway, and Denmark, in the Russo-Japanese War of 1904-1905; or they may exclude certain particular fleets or ships while others are included, as Great Britain in the same war excluded Russian vessels proceeding to the Far East "for the purpose of belligerent operations"; or they may admit all under the same conditions as to length of stay. The limit that finds most favour is twenty-four hours. The Hague Conference of 1907 laid down that belligerent vessels must leave within that time unless they obtained permission to stay longer for purposes of coaling, provisioning, or repairing. But the proviso that these rules were to take effect only "in the absence of special provisions to the contrary in the legislation of a neutral power" deprives them

of any real force and reduces them to the level of advice. The Convention on the subject did, however, deal quite definitely with the simultaneous presence of warships of both belligerents in the same neutral ports, or a warship of one side and a merchantman of the other. In both cases twenty-four hours must elapse between the respective departures. The number of warships of a belligerent which may be simultaneously in one of the ports or roadsteads of a neutral was limited to three; but here again a loophole was left in the provision that the rule applied only in the absence of special legislation to the contrary.

(2) Reception of belligerent prizes into neutral ports.

Originally neutral practice was very lax. Then came a time of varying restraints and conditions, till Great Britain in 1862 forbade belligerents to bring their prizes into her ports in any circumstances, stress of weather alone excepted. Some powers followed her example, others followed different rules. At last in 1907 the Hague Convention on naval neutrality laid down that "a prize may only be brought into a neutral port on account of unseaworthiness, stress of weather, or want of fuel and provisions." But a subsequent article allowed neutrals to admit into their ports and roadsteads prizes brought there to be detained pending the decision of a Prize Court. As

Prize Courts cannot sit in neutral territory, this article appears to contemplate a large resort to the irregular practice of proceeding to adjudication on the papers in the absence of the ship.

(3) The amount and frequency of supplies of fuel and provisions allowed to be taken in neutral waters.

Belligerent warships have generally been allowed to take what provisions were necessary for the subsistence of their crews. The quantity was defined by the Hague Convention on naval neutrality as enough "to bring up their supplies to the peace standard." They might also take sufficient fuel "to enable them to reach the nearest port of their own country," or they might "fill up their bunkers built to carry coal." Having shipped fuel in a neutral port, they might not within three months obtain another supply in a port of the same neutral. These rules, though better than the previous state of uncertainty, are by no means strong enough to keep belligerents from receiving in neutral ports most valuable aid in the prosecution of their war. Yet Germany regards the three-months' rule as too severe, and has entered a reservation against it.

(4) Repairs and internment.

The rule as to repairs is stated in the Hague Convention of 1907 to be that what is necessary for seaworthiness is allowed, but what adds to warlike force is prohibited. The

difficulty is that a vessel which can be navigated with ease and safety is a far more efficient fighting machine than a vessel which cannot. The United States Government laid down in 1905 with regard to the three injured Russian vessels which escaped to Manila from the battle of Tsushima, that "time should not be given for repairs of damages suffered in battle." This differs from the first rule, and might prevent fugitive men-of-war from being made fit to proceed on their voyage. The somewhat numerous cases which occurred during the Russo-Japanese War show that no very serious repairs are likely to be permitted in future. If a belligerent vessel is badly damaged, she must either go out and face the sea and the enemy, or be disarmed and kept in the neutral port till the end of the war. This detention is called internment, and it applies to the officers and crew as well as to the ship. Article 24 of the Hague Convention of 1907 on Naval Neutrality says: "If, notwithstanding the notification of the neutral power, a belligerent ship of war does not leave a port where it is not entitled to remain, the neutral power is entitled to take such measures as it considers necessary to render the ship incapable of going to sea during the war, and the commanding officer of the ship must facilitate the execution of such measures." Surely a strict obligation to intern should have been laid on the neutral

government when one belligerent flouts its authority to the detriment of the other.

(5) Humanitarian action.

The Hague Convention of 1907, on the application of the principles of the Geneva Convention to maritime warfare, permits neutral ships to take on board sick, wounded, or shipwrecked men of the belligerent navies, but gives any belligerent warship a right to demand them from any neutral private vessel. When handed over they become prisoners of war. The Convention on neutrality in war on land binds a neutral power which receives on its territory troops belonging to a belligerent army to intern them as far as possible at a distance from the theatre of war. The reasons given for this difference between the two cases seem insufficient to justify the departure from sound principle involved in allowing the warlike operation of taking prisoners to be carried on at sea under a neutral flag.

(6) The use of neutral means of communication.

The Hague Neutrality Conventions of 1907 prohibit the use of neutral territory or territorial waters for the erection by the belligerents of wireless telegraphy stations, or any other apparatus for the purpose of communicating with their forces by land or sea, and also the use of any such installations established by them before the war on the

territory of a neutral power for purely military purposes. But neutral powers are not put under an obligation to forbid or restrict the use of the ordinary telegraph or telephone cables or wireless telegraphy apparatus, though the proviso that every measure of restriction or prohibition must be applied to both belligerents impartially recognises a right on their part to forbid or restrict, if they please.

### D. Foreign Enlistment Acts and Similar Laws.

These are municipal statutes made by States for the protection of their neutrality. If any provisions in them go beyond the requirements of International Law, belligerents cannot demand that such provisions shall be enforced in their favour. On the other hand, if neutral governments are not armed by their own laws with sufficient power to enable them to fulfil their neutral obligations, the plea of such defect of power is no valid answer to belligerent demands. International Law, not Municipal Law, is the measure of a neutral's rights and obligations.

#### Questions

1. Write down and comment on the chief obligations of belligerent States towards neutral States.

2. Enlarge on the duties of prevention which fall on a neutral State.

3. How should a neutral State govern its conduct with regard to the admission of belligerent warships into its ports and waters, and their subsequent stay therein?

4. Discuss the questions connected with the supply of fuel and provisions to belligerent warships in neutral waters.

## Hints as to Reading

This is the most doubtful and difficult part of the Law of Neutrality, and the student must expect to find conflicting views in the books he reads. In Hall, Chs. III. and XI. of Pt. IV. should be read, the former very carefully, in Westlake, Pt. II., Chs. VIII. and XI., and in Oppenheim, Vol. II., Pt. III., Ch. II. In Wheaton, portions of Ch. III. of Pt. IV. bear on our present subject; and Dana's notes are valuable, especially that on *Neutrality or Foreign Enlistment Acts.* Pt. IV., Chs. II. and III., of Lawrence's *Principles of International Law* (4th ed.) should be carefully studied. Ch. XXIV. of Halleck will be found useful. Holland's pamphlet on *Neutral Duties in a Maritime War* is a valuable piece of arrangement and classification.

## CHAPTER III

### RIGHTS AND OBLIGATIONS AS BETWEEN BELLIGERENT STATES AND NEUTRAL INDIVIDUALS

*Ordinary Commerce*

### A. Various Principles for Regulating Maritime Capture.

On land neutral goods in belligerent territory are subject to the ordinary rules of warfare. At sea the interests of belligerents and neutrals are so interwoven in matters of commerce that it is difficult to separate them and strike at an enemy without injuring a friend. And the close connection between the two is becoming closer, owing to the growth of sea-borne commerce and the increase in the size of the vessels which carry it. It is possible for a ship to be of one nationality, the goods on board to belong to another, and the insurance to be effected in a third. Moreover, the same big cargo-boat may carry merchandise from a dozen different countries. Two principles have found favour in the past as rough attempts to make a workable compromise between the desire of the belligerent

to injure his enemy's trade, and the desire of the neutral to carry on his commerce in safety. They are

(1) That the liability of the goods to capture should be determined by the national character of the owner.
(2) That the liability of the goods to capture should be determined by the national character of the vehicle which carries them.

The first leads to the practical rule that *Enemies' goods can be captured even on board neutral ships, and neutral goods are free from confiscation even on board enemies' ships.* This rule was laid down in the *Consolato del Mare,* the great maritime code of the middle ages. From the end of the sixteenth century to the middle of the eighteenth England held by it in all cases, unless bound by treaty to other rules. The second principle gave birth to the twin rules, *Free ships, free goods; Enemies' ships, enemies' goods.* The Dutch were the great champions of these rules during the period when Holland was the chief carrying power; but in order to get the benefit of them they had to embody them in their treaties.

The combination of the two principles has given two more rules standing at opposite poles of severity to neutrals, according as the severe portions or the lenient portions of the results of these principles are joined together. The first was the French rule, *Neutral goods in enemies' ships, and enemies' goods in neutral ships, are liable to capture.* From 1681 to

1744 this was joined with the still more severe rule, *Neutral ships laden with enemies' goods are liable to capture.* The second is the rule of the Declaration of Paris, 1856, *Enemies' goods in neutral ships, and neutral goods in enemies' ships, are not liable to capture.* This is the old rule, *Free ships, free goods,* without the corollary, *Enemies' ships, enemies' goods.* Attempts were made to introduce it into International Law by Prussia in the Silesian Loan controversy, and by the Armed Neutralities of 1780 and 1800. But the opposition of Great Britain was successful, and she did not agree to it till after the Crimean War, in 1856. The rule has been accepted by nearly all civilised powers through their adhesion to the Declaration of Paris, by the second article of which *The neutral flag covers enemies' goods, with the exception of contraband of war,* while by the third it is provided that *Neutral goods, with the exception of contraband of war, are not liable to capture under the enemies' flag.*

## B. Rules of Capture now in Force against Neutrals.

The rules of capture which affect the ordinary trade of neutrals—that is to say, their trade unconnected with blockade, contraband, or unneutral service—may be considered as dealing with

(1) Ships and goods without special protection from the neutral sovereign.

With regard to these we may lay down that

(*a*) If a ship purporting to be neutral has been colourably, but not really or completely, transferred to the neutral flag, or is sailing under the flag, pass, or licence of the enemy, or is chartered by the enemy, she is liable to capture and condemnation. Similarly, if goods purporting to be neutral have been transferred from an enemy to a neutral owner while in course of transit under an enemy flag, they are, as a rule, liable to condemnation as being still enemy property.

(*b*) Though a neutral merchant has the right to lade his goods on board an unarmed merchant vessel belonging to a belligerent, it is very doubtful whether he may lade them on board an armed merchant vessel of a belligerent without rendering them liable to capture, and certain that he may not lade them on board a belligerent ship of war.

(*c*) Resistance to belligerent search on the part of a neutral vessel renders both vessel and cargo subject to confiscation.

(2) Ships and goods specially protected by means of Convoy.

We can trace back to the middle of the seventeenth century claims on the part of various neutral States that their merchantmen should

be exempt from belligerent search, if under the convoy or escort of their ships of war. The number of these powers gradually increased, till at length Great Britain was left alone in maintaining that the right of search could not be defeated by the acceptance of convoy, and that resistance on the part of the convoying ship rendered all the convoyed vessels liable to capture and condemnation. She withdrew her opposition at the Naval Conference of 1908-1909, and concurred with the other great maritime Powers in the Declaration of London of 1909, which conceded the point at issue, subject to the conditions that

(*a*) At the request of the commander of a belligerent warship the commander of a convoy must give in writing "all information as to the character of the vessels and their cargoes which could be obtained by search."

(*b*) In case the commander of the belligerent warship is still suspicious, the commander of the convoy is to investigate the matter and communicate a copy of his report to the commander of the warship.

(*c*) If the report goes against the suspected vessel, she forfeits protection and can be captured. If the two officers disagree, the commander of the belligerent war-

ship must be content to protest, and the matter must go for settlement to the Governments concerned.

## Questions

1. Write a short historical account of the rule, *Free ships, free goods.*

2. In what circumstances may a ship purporting to be neutral be captured as an enemy vessel?

3. What is the effect of resistance to belligerent search?

4. Give the rules of the Declaration of London on the subject of convoy.

## Hints as to Reading

Chs. IV., VII., IX., and X. of Hall's Pt. IV. should be read. Portions of Ch. III. of Wheaton's Pt. IV., and of Chs. VI. and IX. of Westlake's Pt. II., deal with our present subject, as also does Lawrence in Pt. IV., Ch. IV. (4th ed.), and Oppenheim in Vol. II., Pt. III., Ch. VI. Lecture V. of Maine should be studied, and Ch. XXVIII. of Halleck may be referred to.

## CHAPTER IV

### RIGHTS AND OBLIGATIONS AS BETWEEN BELLIGERENT STATES AND NEUTRAL INDIVIDUALS

*Blockade*

### A. The Nature of Blockade.

MARITIME law gives to belligerents the right to prevent access to or egress from the ports of their enemy by stationing a ship or a squadron in such a position that they can intercept vessels attempting to approach or leave such ports. This is called establishing a blockade, and, as it cuts off neutral trade, the Law of Blockade is an important part of the Law of Neutrality. Till lately there were two schools of doctrine on the subject, which may be called shortly the English and the French after the two nations who were the protagonists in the controversy. But they began to come together when in 1856 they signed the Declaration of Paris, and they completed the process of agreement in 1909, when, in common with the other great maritime powers, they negotiated the Declaration of London, which combined the best points of former practice

and theory in a complete outline of the Law of Blockade. Great Britain gave up her view that a blockade-runner was *in delicto* from the moment she left the neutral port to the moment she finished her return voyage; and France gave up her theory that every blockade-runner was entitled to receive a direct and individual warning from an officer of the blockading force before she could be captured. When this was done the adjustment of other points presented no insuperable difficulties. The Declaration of London still (Sept. 1909) awaits ratification; but there can be little doubt that it sets forth the Blockade Law of the immediate future. We will begin with a description of the operation itself.

Belligerents sometimes endeavoured to gain all the advantages of a blockade by merely issuing a proclamation to the effect that the enemy's coast, or a part of it, or certain ports along it, were blockaded, or by supporting such a proclamation with an insufficient force. But such attempts are now plainly illegal. All doubt on the subject, if any existed, was set at rest by the fourth article of the Declaration of Paris, which forbids what are called Paper Blockades, in the words,

> *Blockades, in order to be binding, must be effective —that is to say, maintained by a force sufficient really to prevent access to the coast of the enemy.*

This is explained by all the authorities to mean that the force must be sufficient to make entrance or egress difficult and dangerous; and the Declaration

of London practically asserted the same thing when it laid down that "the question whether a blockade is effective is a question of fact." It added that in order to be binding, a blockade, besides being effective, must also be declared and notified. It is declared when the blockading power, or the naval authorities acting in its name, issue a statement of the date when the blockade begins, the limits of the coast-line under blockade, and the period of time within which neutral vessels are free to leave the blockaded area. It is notified to neutral powers when the blockading power has communicated the declaration to their governments, to the authorities of the blockaded port when the commander of the blockading force informs them of it, and to a neutral vessel approaching a blockaded port in *bona fide* ignorance of the blockade when an entry of the declaration is made in its log-book by an officer of one of the ships of the blockading force. As long as these conditions as to effectiveness, declaration, and notification are complied with, neutral States are bound to submit to the disabilities inflicted by blockade on their trade, if only the blockaders are impartial in applying them, and show no special indulgence to their own vessels or the vessels of some favoured neutral. A belligerent State may blockade ports held against it by rebels or enemies, even though they are situated in its territory. On the other hand, it may not declare a blockade of its own ports under its own rule, or of ports which it holds in its military occupation.

## B. The Kinds of Blockade.

Blockades may be distinguished by differences in the ultimate objects for which they are undertaken. This gives us

(1) Military or Strategic Blockades carried on with a view to the ultimate reduction of the place blockaded, or to seal up enemy warships therein.

(2) Commercial Blockades, where the object is simply to weaken the resources of the enemy by cutting off his external trade. Such blockades have been denounced as unwarrantable interferences with neutral commerce; but there can be no doubt of their legality, though there may be much of their utility, except in the cases where States subjected to them have little or no land frontier across which commerce can be carried on with ease and safety.

## C. The Offence of Breaking Blockade.

To constitute a breach of blockade three things are necessary.

(1) The existence of an effective blockade duly declared and notified.

If the blockading force is temporarily removed in consequence of stress of weather, the blockade still continues in law, but if it is withdrawn for any other reason or driven away, the blockade is raised, and on its

resumption a fresh declaration and notification are required. This is also the case with regard to an extension of a blockade already existing. If a declaration of blockade dates the commencement of the blockade from a day on which it did not commence, or assigns to it geographical limits wider than those within which it is operative, no blockade is held to exist. The declaration is void, and another which corresponds with the facts must be made.

(2) Knowledge of its existence on the part of the shipmaster supposed to have offended.

Such knowledge may be either actual or presumptive. Knowledge is presumed when the vessel left a neutral port after notification of the blockade had been duly made and had had time to reach the port and be published by the local authorities.

(3) Some act of violation.

This takes place when a vessel, seeking ingress, enters the area of operation of the warships detailed to carry on the blockade. The area in question may be large or small according to circumstances; but it must always be an area so effectively watched by the blockaders that an evident danger of capture exists within it. An attempt at egress is also a breach of blockade; but if the declaration of blockade has not been notified to the local authorities, or, having been notified, has contained no mention of the

period allowed for leaving, a neutral vessel coming out must be allowed to pass free. Egress within the appointed days of grace is, of course, no offence. In all cases a vessel attempting to break blockade is liable to capture as long as she is pursued by a ship of the blockading force, though not necessarily by the same ship that began the chase. Nor does the fact of her having taken refuge in a neutral port necessarily terminate pursuit. The pursuing blockader can wait for her outside. But if the pursuit is abandoned, or the blockade is raised during its continuance, capture can no longer be made. There is no act of violation, and consequently no liability to capture, when the vessel is actually on her way to a non-blockaded port, no matter what is her ulterior destination or that of her cargo.

### D. The Penalty for Breach of Blockade.

Generally it is confiscation of ship and cargo; but the vessel alone is condemned, if it is proved that at the time of the shipment of the goods the shipper neither knew nor could have known of the intention to break the blockade. The crews of captured blockade-runners may be detained, if needed as witnesses before a Prize Court; but they may not be held as prisoners of war.

### E. Miscellaneous Provisions.

A blockading force must not be so stationed as to bar access to neutral ports and waters. A neutral

vessel in distress may enter and leave a blockaded port without discharging or shipping cargo, but the blockading commander is judge of the validity of her plea of distress. He may give permission to neutral warships to enter and leave, but such permission is a matter of courtesy. It cannot be claimed as a right.

### Questions

1. Deduce from the Declaration of Paris and the Declaration of London the tests of the effectiveness of a blockade.

2. What are Commercial Blockades? Discuss their legality and utility.

3. What acts amount to a violation of blockade? Within what limits may capture be effected in consequence?

4. Give the penalty for breach of blockade. In what circumstances is cargo exempt?

### Hints as to Reading

The Law of Blockade is discussed in Hall, Pt. IV., Ch. VIII.; in Wheaton, Pt. IV., Ch. III.; in Westlake, Pt. II., Ch. IX.; and in Lawrence, Pt. IV., Ch. V. (4th ed.). Oppenheim's Vol. II., Pt. III., Ch. III., gives an account of it, and Halleck considers it in Ch. XXV. In the Letters of Historicus there are two letters on the subject. The Declaration of London will be found in the Appendix of Whittuck's *International Documents*, and in Higgins.

# CHAPTER V

## RIGHTS AND OBLIGATIONS AS BETWEEN BELLIGERENT STATES AND NEUTRAL INDIVIDUALS

*Contraband Trade*

### A. The Nature of the Offence of Carrying Contraband.

MARITIME law gives to belligerents the right of intercepting on the way to the enemy such goods as are directly and essentially necessary to him in the conduct of his hostilities. The exercise of this right involves the capture of neutral goods when they are what is called Contraband of War. Vehement and sometimes bitter controversies arose on some of the points connected with such capture; but a general agreement was reached at the Naval Conference of 1908-1909, and embodied in the Declaration of London. Most of the rules laid down in it will be found in the text of this chapter.

Neutral merchants are under no obligation to refrain from trading in contraband; but if they convey it to a belligerent they must risk capture

by the other belligerent. Their own government will not protect them; neither, on the other hand, is it bound to prevent their trade. It is to be noted that

(1) The offence consists not in selling the goods, but in carrying them.
(2) To create the offence a belligerent destination is essential; but it need not be immediate. If one or more neutral ports of call are interposed, the real and final terminus of the voyage being belligerent, the goods are condemned.
(3) The offence is complete the moment a vessel carrying contraband leaves port for a belligerent destination, and is "deposited" the moment the destination is reached and the goods delivered.

## B. The Tests of Contraband Character.

In discussing what is contraband we shall be helped by the old division of all goods into three classes: the first being those useful primarily and ordinarily for warlike purposes, such as arms and ammunition; the second, those useful primarily and ordinarily for peaceful purposes, such as ploughs and chairs; and the third, those useful indifferently for warlike and peaceful purposes, technically called articles *ancipitis usus*, such as coals and food. It was universally admitted that the first kind were always contraband, and the second never. But there was a great difference of opinion as to the contraband character of the third class, and also

as to the articles to be included in each of the classes. It was the custom for belligerents to publish at the beginning of a war lists of the goods they considered as contraband, and to revise these lists during the war, due notice of the originals and of any changes in them being given to neutral governments. But these latter were not bound to accept the belligerent lists in their entirety. They could, and often did, demur to the presence of certain articles, and if the belligerent would make no concessions, dangerous controversies arose. Not the least of the services rendered to the cause of peace by the Naval Conference of 1908-1909 was the embodiment in the Declaration of London of lists of Goods Absolutely Contraband, Goods Conditionally Contraband, and Goods never Contraband, all agreed to by the great maritime powers represented at the Conference, and therefore almost certain to be embodied in International Law through acceptance by the civilised world. They are binding on the signatory powers in wars between themselves; but liberty is reserved for any State to add to the first two lists, or subtract from them, by means of a notification addressed to the governments of other powers, who may, of course, object to any of the proposed additions.

Absolute Contraband consists of "goods exclusively used for war," Conditional Contraband of goods "susceptible of use in war as well as for purposes of peace." Great Britain and the United States contended that the latter kind of goods might lawfully be treated as contraband if they were destined

for warlike purposes, and that such destination might be shown by a variety of circumstances, the most conclusive being the destination of the vessel which carried them. Till lately opinion on the Continent of Europe ran strongly against this view, and maintained that there was only one kind of contraband and that Absolute Contraband. Moreover, its tendency was to cut down the list of Absolute Contraband as much as possible. But a gradual change has taken place in the last few years. Great Britain became willing to give up her doctrine of conditional contraband, and indeed to sweep away the whole law of contraband at one blow, while Continental powers developed the doctrine of conditional contraband on their own lines. The Declaration of London retains both classes—Absolute and Conditional—and its list of each is satisfactory. It lays down that

(1) Goods Absolutely Contraband can be captured when found on their way "to territory belonging to or occupied by the enemy, or to the armed forces of the enemy." Proof of such destination is complete when

(*a*) According to the evidence of the ship's papers, the goods are to be discharged in an enemy port or delivered to the armed forces of the enemy.

(*b*) The ship is to call at enemy ports only, or, before going to the neutral port at which according to her papers the goods are to be discharged, is to touch at an

enemy port or meet the armed forces of the enemy.

(2) Goods Conditionally Contraband can be captured when found on their way to the armed forces or government departments of the enemy State. Such destination is presumed when the goods are consigned to

(*a*) The enemy authorities, or a trader established in the enemy country who as a matter of common knowledge supplies articles of this kind to the enemy government.

(*b*) A fortified place of the enemy or a base for his armed forces.

These presumptions may, however, be rebutted.

Conditional Contraband is liable to capture only when "found on board a vessel bound for territory belonging to or occupied by the enemy, or for the armed forces of the enemy, and when it is not to be discharged in an intervening neutral port." But in cases where the enemy country has no seaboard, it can be captured on board an enemy ship bound to a neutral port, if the ultimate destination of the goods to an armed force or government department of the enemy is clearly proved. In the case of Absolute Contraband the proof of destination to the enemy's armed forces, or to territory belonging to or occupied by the enemy, is sufficient, even though the carriage thither entails transhipment or a land journey. In other words, the doctrine of continuous

voyages applies to Absolute Contraband, but not to Conditional Contraband unless the enemy is an inland State.

### C. The Penalty for Carrying Contraband.

Contraband goods may be confiscated, and the vessel also "if the contraband, reckoned either by value, weight, volume, or freight, forms more than half the cargo." Moreover, goods belonging to the owner of the contraband and forming part of the same cargo are liable to confiscation. Contraband goods sent to sea in ignorance of the outbreak of war, or of the declaration of contraband which applies to them, cannot be confiscated unless compensation is paid for them. A shipmaster may claim the benefit of this rule after becoming aware of the outbreak of hostilities, or of the declaration of contraband, if he has had no opportunity of discharging the noxious goods. The commander of a belligerent warship which meets a neutral vessel carrying contraband, but not in the proportion which justifies her own confiscation, may allow her to continue her voyage if the master is willing to hand over the contraband, which the captor is then at liberty to destroy. As soon as the carriage of contraband is at an end the liability of the vessel to capture is at an end also.

#### Questions

1. Explain the meaning of the phrase contraband of war. What constitutes the offence of carrying contraband?

2. Distinguish between Absolute and Conditional Contraband; and point out the differences in the legal rules applicable to them as regards (*a*) destination, (*b*) proof.

3. Show the importance of generally accepted lists of Goods Absolutely Contraband, Goods Conditionally Contraband, and Goods never Contraband. How would you provide for the revision of such lists?

4. What is the usual penalty for carrying contraband? Show how circumstances may lead to its increase or modification.

## Hints as to Reading

The reader of Hall will find the Law of Contraband set forth in Pt. IV., Ch. V. It will also be found in Oppenheim, Vol. II., Pt. III., Ch. IV., Westlake, Pt. II., Ch. X., and Lawrence, Pt. IV., Ch. VI. (4th ed.). Halleck gives it in Ch. XXVI., and Wheaton in Pt. IV., Ch. III. Much clear and valuable reasoning on the subject will be found in the Letters of Historicus on the *Trent* affair. The text of the Declaration of London is indispensable.

## CHAPTER VI

### RIGHTS AND OBLIGATIONS AS BETWEEN BELLIGERENT STATES AND NEUTRAL INDIVIDUALS

*Unneutral Service*

### A. **The Nature of Unneutral Service.**

A NEUTRAL individual is forbidden to perform for a belligerent certain services of a character so distinctively unneutral that they go beyond the bounds of trading and amount to taking part in the war, though not in the actual fighting. The closeness of the connection with the belligerents' warfare varies from case to case. The offence may be merely the transport of a general or admiral by special agreement, or it may be something that only just falls short of taking a place in the fighting line, for example laying mines, or showing the channel to vessels advancing to an attack.

The Declaration of London, which for the first time reduced to systematic form the Law of Unneutral Service, varied the penalty and adjusted it to the gravity of the offence, as we shall see in the next section. It also founded its rules on the

principle, too often forgotten, that acts of unneutral service stand on a different footing from the carriage of contraband. The two offences differ in character, in proof, and in penalty. In contraband trading the neutral is engaged in a commercial transaction dealing with commodities, in unneutral service he is performing acts whose predominant attributes are warlike rather than mercantile. Contraband must be on its way to a belligerent destination in order to justify its seizure: destination is immaterial in the case of unneutral service. In contraband the penalty of confiscation falls first and foremost on the noxious cargo, and the ship is condemned only in special circumstances: in unneutral service the penalty falls first and foremost on the vessel, and the cargo is condemned only in aggravated cases.

### B. Acts of Unneutral Service and the Penalties attached to them.

The provisions of the Declaration of London lead to the following classification.

(1) Acts which render the vessel and any goods on board belonging to her owner liable to confiscation, and place her in the position of a neutral ship seized when carrying contraband. These acts are

(*a*) Carriage by special agreement "of individual passengers who are embodied in the armed forces of the enemy."

(*b*) Transmission by special agreement "of intelligence in the interest of the enemy."

(*c*) Carriage of a military detachment of the enemy "to the knowledge of either the owner, the charterer, or the master."

(*d*) Carriage in the same circumstances of knowledge "of one or more persons who in the course of the voyage directly assist the operations of the enemy."

The assimilation of the ship in these cases to "a neutral vessel liable to confiscation for carriage of contraband" means that her non-contraband cargo is secure unless it belongs to her owner, her liability to capture ceases at the termination of her voyage, and she retains her neutral character. As a neutral vessel she has a right of appeal to the International Prize Court, and cannot be destroyed at sea, unless her preservation would endanger the safety of the capturing warship, or the success of the operations on which it was engaged at the time.

(2) Acts which render the vessel and any goods on board belonging to the owner liable to confiscation, and place the vessel in the position of a captured enemy merchantman. These acts are

(*a*) Taking a direct part in hostilities, such as executing repairs at sea to an enemy warship, or searching for and removing mines laid in channels through which the enemy desires to pass.

(*b*) Sailing under the orders or control of an agent placed on board by the enemy government.

(*c*) Being in the exclusive employment of the enemy government.

(*d*) Being exclusively engaged at the time either in the transport of enemy troops, or in the transmission of intelligence in the interests of the enemy.

The assimilation of the ship in these cases to an enemy merchantman means the confiscation of all enemy goods on board, and the liability of the vessel to seizure as long as the service lasts, though she may not be actually performing it at the moment of capture. She may be destroyed at sea without the responsibility for compensation which exists in the case of neutral ships unless extreme necessity can be proved. But the right of appeal to the International Prize Court has not been taken away from her.

### C. **Miscellaneous Provisions.**

Persons found on board neutral merchantmen who belong to the armed forces of the enemy may be taken out and made prisoners of war even though, from lack of knowledge on the part of the master of their true character, or from any other cause, there is no ground for the capture of the vessel. When the neutral vessel carrying such passengers is not exclusively and permanently in

the service of the enemy, it may not be confiscated if at the time of seizure the master was unaware of the outbreak of hostilities, or, though aware, had had no opportunity of disembarking the passengers in question.

### Questions

1. Distinguish between the offence of unneutral service and the offence of carrying contraband.

2. Give and explain the distinction made in the Declaration of London between the lighter and the graver offences included under the term unneutral service.

3. When is the offence of unneutral service deposited?

4. In what cases of unneutral service could the plea of want of knowledge be made successfully?

### Hints as to Reading

Hall deals with this subject under the title of *Analogues of Contraband* in Ch. VI. of Pt. IV., and Oppenheim in Vol. II., Pt. III., Ch. V. It is considered towards the end of Ch. III. of Pt. IV. of Wheaton, in Pt. II., Ch. X. of Westlake, and in Pt. IV., Ch. VII. of Lawrence (4th ed.). Dana's note in his edition of Wheaton on *Carrying Hostile Persons or Papers* is valuable. But now the text of the Declaration of London and the General Report of the Drafting Committee of the Naval Conference practically supersede all other documents. Both are to be found in Higgins.

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THE END

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